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LEGAL AND INSTITUTIONAL ASPECTS OF INTERSTATE POWER PLANT DEVELOPMENT IN THE OHIO RIVER BASIN ENERGY STUDY REGION

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16. ABSTRACT

This report was prepared in support of the Ohio River Basin Energy Study (ORBES), a multidisciplinary policy research program supported by the Environmental Protection Agency. It discusses both the present legal and institutional setting of power plant siting and development and possible legal and institutional means to solve problems in this setting. One potential vehicle, interstate compacts, also receives extensive treatment. The report draws upon experiences in the six states in the ORBES study region--Illinois, Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia.

The specific topics covered include: present federal policy that necessitates efficient interstate coordination of power development; existing, proposed, and potential federal laws; state siting law; state law as a solution to the coordination problem; the interstate compact as a device for interstate cooperation and coordination; the interstate compact as a solution to the interstate coordination problem; judicial review; and the use of electric utility industry regional and national organizations.

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FOREWORD

The Ohio River Basin Energy Study (ORBES) is an interdisciplinary, multi-university inquiry into the environmental, economic, and social impacts of energy facility development in a major portion of the Ohio River Basin. The study was initiated by the U.S. Environmental Protection Agency in 1976 in response to a directive from the U.S. Senate Appropriations Committee.

Most of the ORBES research was conducted by a group of faculty members at the University of Illinois, Indiana University, the University of Kentucky, the University of Louisville, The Ohio State University, the University of Pittsburgh, Purdue University, and West Virginia University. In a few instances, the necessary expertise was found at other universities or independent research organizations.

This report is one of a series produced in support of the overall ORBES assessment. For a summary of the entire study, see Ohio River Basin Energy Study (ORBES): Main Report, by the ORBES Core Team, also being published by the U.S. Environmental Protection Agency.

PREFACE

A few words about the organizational scheme of this study are in order. This study discusses both the present legal and institutional setting of power plant siting and development and possible legal and institutional means to solve problems existing in the present setting. The legal setting includes federal and state laws, judicial review and some private planning. In addition interstate compacts though not part of the present legal landscape, except marginally, could play a prominent role in the solution to one of the main problems caused by present laws, the lack of regional interstate coordination of power plant siting. Therefore compacts are dealt with extensively both as to their history and legal status and their possible future use in the power plant siting context.

This study begins by briefly canvassing the federal law background to the interstate coordinative need, including discussion of some federal constitutional doctrine affecting state-federal relationships. Potential federal solutions are then discussed. State law affecting siting is then briefly discussed, followed by a discussion of the nature of state uniform and reciprocal laws and of their potential for use to solve the coordination problem. That is followed by a full discussion of interstate compacts: first as to what they are and second as to how they might be used in this context. Next is a section focusing on judicial review which discusses the problems created by courts and the possibility of using courts as the primary solution to the coordination problem. Finally, the possibility of private planning for interstate coordination is discussed.

This is divided into eight main sections which are numbered consecutively even though grouped under five chapters. Thus Chapter II contains Sections 3 and 4 and Chapter III contains Sections 5 and 6. It might seem anomalous that a subsection of a chapter could start with a number higher than one, but the seeming anomaly dissolves if it is remembered that the "Sections" are the main divisions of this report and the "Chapters" are merely convenient organizing groupings of some of the sections. There are two sections concerning federal law and two concerning state law and two on compacts and one on judicial review and one on private planning, which, can be seen to make five convenient groupings of the eight sections. Hopefully, the Summary Table of Contents before the Table of Contents will make clear the reasons for this organization.

Although this study is the product of many minds other than mine, as the many quotations from, and citations to, scholarly works attest, I owe a special debt of gratitude to Boyd R. Keenan, professor of political science, University of Illinois at Chicago Circle and Vincent P. Cardi, my colleague on the law faculty here at West Virginia University. Their comments and encouragement were very helpful. Finally I owe a special debt of gratitude to Miss Johnella Olexa who typed the final draft presented here.

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INTRODUCTION AND SUMMARY OF CONCLUSIONS

The Problem

The federal government has established a complex and changing environmental and energy policy codified in a complex code of regulations further elaborated by federal agencies all to be implemented "voluntarily" by the individual states with constant monitoring by several federal agencies. Provision is made for federal-state cooperation. But the environmental and energy problems addressed by the state implemented federal policy are interstate in nature--some aspects of which are national, most, at least, interstate-regional. The natural markets for energy resources is interstate, guaranteed by the federal constitution to remain interstate. Transportation of these resources is naturally interstate. Transportation of the end resultant useable energy is likewise interstate. Air and water pollution is by its nature interstate. Even solid waste disposal is an interstate problem--no state can unilaterally isolate itself from the natural interstate market for disposal sites. Yet, only lip service has been paid to the interstate nature of the problem of implementing the federal energy-environmental policy.

Two distinct but interrelated results obtain from the current implementation scheme: (1) inefficent allocation of energy resources and their transformation into useable energy and (2) conflict between states. Interstate conflict leads inevitably to litigation in a court system not designed for the swift resolution of disputes of this order of magnitude. This results in inefficiency in the entire implementation scheme--an inefficiency that can be ill afforded in a system already burdened by the problems of multiple federal agency monitoring of state implementation of complex federal policy. This regulatory inefficiency caused by interstate conflict exacerbates the allocatory or economic inefficiency caused by the lack of interstate cooperation in implementation. Thus not only is, say, the location of a particular new electrical generating facility likely to be in the wrong place in terms of achieving national energy and environmental goals but it will take much longer to locate it anywhere. In short, the present system seems designed to get the wrong result after exaggerated delay and cost. Or, at least, it is not designed to get the best result in the swiftest way possible.

The very nature of our federalistic legal and political order occasions this inefficiency. But without compromising that essential order, there are available means of achieving greater efficiency in electrical power development by improving the interstate coordination of the development enterprise. Remember "efficiency" means achievement of energy and environmental purposes without undue delay.

Various Legal Mechanisms Potentially Available For Solution--Summary Of Conclusions

The interstate compact or agreement has long been suggested as a solution. The two sections on compacts in this study suggest that a whole range of interstate agreements is possible but that the legal consequences of any particular agreement cannot be precisely determined. The range of possibilities includes: an agreement to exchange information about siting proposals within each member state; or an agreement to give standing to each other before each member state's siting decision-makers; or an agreement to provide a joint task force for region-wide planning of future site locations with or without federal agency participation at the initial stage; or an agreement to provide a region-wide plan for electric power development with regional implementation, or, without a plan, to set up a regional siting authority.

Although a regional siting authority is legally feasible, with Congressional consent, it is politically impractical. In fact regional planning is probably politically not a plausible alternative unless each member state has an opportunity to opt in or out after the plan is formulated. A sample of such a scheme using the Ohio River Valley Water Sanitation Compact Commission as the foundation for a planning task force is included in the section on compacts.

A compact purely to gather, process and disseminate information on a region-wide basis would probably not need congressional approval. As the processing becomes more elaborate, moving from simple ordering of data to analysis and projection of impacts, the need for constant federal agency input becomes more urgent. In fact, the more complete the interstate coordinative scheme becomes the greater the need for including federal agencies as full working partners. There is now precedent for a federal-interstate compact and a sample compact of this nature is included in this study. Although, a federal-interstate compact seems an attractive alternative to complete federal control on the one hand or fragmented state control on the other, the practical political and legal difficulties of such a scheme may be insurmountable. A regional agency has no polity. It is dependent on a conglomerate of jealous state polities and continuing national approval. Disputes will arise, both in planning and in implementation. The courts will be resorted to as the recent experience of the planning and regulatory compact between California and Nevada to govern Lake Tahoe development makes clear. Because judicial involvement is central to the success or failure of any interstate coordinative scheme that goes beyond mere information exchange, a section is included in this study that attempts to explain the intricacies of judicial involvement in the administrative process and how such involvement might be better utilized. Judicial involvement is inevitable; the attendant delay and confusion may not be.

Of course, if regional arrangements are not forthcoming, and the need for regional rationalization of electrical energy development continues to press, federal control becomes a likely option. But a federal solution need not mean complete federal control. The few federal proposals for specific federal electrical generating facility siting policy have opted for state implementation modeled on the environmental laws. These proposals, which are discussed in Section 2 of this study, only recommend but do not command interstate coordination. They would make for a more uniform system of state siting, federally monitored, but since they do not require accounting for interstate impacts no improvement in interstate efficiency would result--i.e., a new layer of bureaucracy with no solution to the problem.

What might be possible at the federal level is region-wide studies (ORBES for example) followed by advisory regional plans such as those generated for water resources by the Ohio River Basin Commission. Of course such advice need not be taken by state siting agencies but it could give guidance to such agencies and direction to the private utilities in their planning. Such regional planning could be coupled with a special-federal regional court that would have sole federal jurisdiction to review state siting decisions at the instigation of either the federal planning agency, other states, or even private parties. The sole issue for review would be conformity to the plan. Of course, such review would inevitably involve some review of the basic fairness of the plan and whether it was a reasonable carrying out of the Congressional planning mandate. Some interests would probably seek to use such court as an immediate review agency of the siting plan, before any specific siting decisions are made thereunder. Such premature review probably should be avoided.

Another federal solution, at least to the interstate conflict part of power plant siting, is to set up a special federal siting court (on any of several models suggested in Section 7 of this study) without any regional planning. Such a court would have all such disputes channelled through it and have an expedited procedure. It could either be peopled with specially chosen experts or if picked from the general federal judiciary, it could have a staff of experts to aid it in its deliberation.

Another federal approach to problem of interstate coordination would be to set up a federal agency whose sole function is to coordinate state siting decisions. It could require that all state siting decisions be preceded by an interstate impact statement sent to it for review before a final decision is made. Legislation creating such an agency could make it the sole federal agency for review of state siting decisions and could make its assessment of the interstate impact statement purely recommendatory or the agency could be authorized to seek to enjoin the state siting decision if made against its recommendation or if based on an inadequate interstate impact statement.

The final federal solution would be to give the Federal Energy Regulatory Commission site licensing authority for all non-nuclear electrical generating development.

A state law solution could be sought through reciprocal legislation where an adopting state authorizes the intervention before its siting authority of representatives of any other adopting state. It could even provide for mandatory binding arbitration for disputes, modeled on the Uniform Arbitration of Death Taxes Act.

Finally, can interstate coordination of siting be effected by facilitating the voluntary coordination of the private utilities? In enacting § 202(a) of the Federal Power Act providing for "voluntary interconnection and coordination of facilities," Congress was "confident that enlightened self-interest will lead the utilities to cooperate . . . in bringing about the economies which can alone be secured through planned coordination." (Senate Report #621, 74th Cong., 1st Sess. 49 (1935).) Although the electrical utility industry is organized into nine regional reliability councils under a National Electric Reliability Council (NERC) and into numerous power pools and agreements to the end of economic efficiency so that a reliable and adequate supply of electricity is maintained, it is not organized to promote the equitable distribution among the states of the environmental and economic impacts caused by the development of increased generating capacity. But one of the goals of interstate coordination is economic efficiency and the private sector can better achieve that goal if allowed to pool and interconnect without regard to state lines. State power siting authorities may disrupt this. Perhaps the best and simplest solution would be a system of one stop federal licensing of new sites following region-wide submission by the private reliability councils of 10-20 year plans for power development with provisional approval of such plans by a consortium of federal officials and state officials within the region.

GLOSSARY OF TERMS

Note: The following glossary defining terms used in this study and other related studies and papers should be read for itself as a general background to this study. It may also be useful as a ready reference while reading this study.

CRUCIAL TERMS:

Coordination:

activities in which officials of different states do not work together but perform complimentary actions with awareness of each other's actions and of the reciprocal efforts to avoid duplication, conflict, complications and of the reciprocal efforts to meet similar goals. No common agency or binding agreement or compact is necessary but coordination could be facilitated through common agency or formal agreement.

Cooperation:

activities in which the officials of different states agree and do work together with varying degrees of institutional integration. New York Port Authority and Ohio River Valley Water Sanitation Commission (ORSANCO) for example.

Regional:

a governmental area covering parts of two or more states. Generally a Region has a natural delineation (like a river drainage basin) that relates to the governmental purpose the area is set up for. This use of "regional" is in contrast to the use of "region" in § 107 of the Clean Air Act where it is intrastate in most cases. Where there might be confusion the phrase "interstate region" is used.

FUNCTIONS OF GOVERNMENT:

Intelligence Function:

(Used as the first of Professor Myers McDougal's[*] seven decisional functions.)-- the gathering, processing and dissemination of information relevant to social choices in all other decision functions.

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[*] McDougal & Vlassic, Law and Public Order in Space, 1046-85 (1963), as cited and discussed in W. Reisman & G. Simson, Interstate Agreements in the American Federal System, 27 Rutgers L. Rev. 70, 73 (1973). Their definition of coordination & cooperation were also useful. Id. at 75.

Promotion Function:

"agitation" for adoption of certain preferred policies as "prescriptions" (law). "Agitation" is McDougal's word and would include the various means of promoting proposals for prescriptive legislation, which includes (1) "getting the ear" (or "catching the eye") of the legislators and (2) trying to persuade them by showing (a) the intrinsic worth of the proposal and/or (b) the popular support for the proposal.

Prescription Function:

adoption of policies as authoritative or as law. This is generally thought of as the "legislative" function but in truth legislatures perform an intelligence and promotion function as well. (They also regularly perform the last two of McDougal's functions "termination" and "appraisal" not defined in this glossary.) Moreover, the "rule-making" authority of administrative agencies is prescriptive. Crucial to prescription is the power to command obedience. But "commanding obedience" can be a subtle process as well as a physically coercive one. Especially is this true in a federal system where the central government mandates state cooperation or state adherence to federal rules. This process of securing obedience is discussed below under "sanctions."

Invocation Function:

the assertion that a prescription has or is being violated and the provisional characterization of such deviation. This is a function generally performed by police departments (from muni cops to the FBI) or the investigative arm of administrative agencies. Prosecuting or other public attornies also participate in this function which is close to the "executive branch" notion of traditional tri-partite nomenclature. An administrative agency's investigative authority may be for "intelligence" purposes as a prelude to promotion or prescriptive rule-making, as well as, investigation of violations of existing prescriptions which is part of this invocation function.

Application Function:

the authoritative specification of a violation or deviation from prescriptions and the designation and implementation of a sanction program. Under traditional nomenclature this is the "judicial" function, performed in this country by courts. Administrative agencies and even city council sometimes play a role in this application function. See "Sanctions" below.

Sanctions:

in this context means measures taken to induce conformity to prescribed behavior or law. They are of two general varieties roughly suggested by the carrot and stick with the donkey metaphor. But as we shall see, the carrot in our federal system sometimes becomes a stick and the distinction is hard to maintain.
The stick variety are usually thought of as punishments. Fine and imprisonment are the only two such sanctions allowed in our system (except against children). Obviously they are not always successful in inducing the prescribed behavior. Against large groups such as labor unions they are not very effective. In our

American system, such coercive sanctions are almost always imposed by a court of law. The enforcement of administrative cease and desist orders is by court injunction which, then, is backed by fine or imprisonment.

But there are other sanctions that are not physically coercive. These "sanctions" can be used to induce behavior, do not require court action, but are "coercive" enough (or otherwise effective enough) that the behavior they are designed to induce can be called "prescribed." Federal grants in aid to states or to private entities are often conditioned on conforming to certain behavior. When felt dependency on such federal funds is great enough, then the actors feel "coerced" into conformity. Most employers induce obedience from employees by the threat of discharge. Likewise when the federal government has a program which it wants state government to implement it offers the states money to run the program and for some measure of control over the program or both. Once so "employed" the state is induced to adhere to federal direction by threat of being "fired" and replaced by a federal agency. This is the mode of "sanction" of the Clean Air Act, with its State Implementation Plans (SIP's); the Federal Water Pollution Control Act Amendment of 1972 with NPDES all modeled on the Social Security Act of 1935. 42 U.S.C. §§ 301 et seq. (especially Titles IX and III relating to Unemployment Compensation.) In Stewart Machine Co. v. Davis, 301 U.S. 548 (1937) the Court upheld the state-federal cooperation plan. It refused to find that the tax and credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. "The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. The difficulty with the petitioner's contention is that it confuses motive with coercion. 'Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared to others not taxed' . . . . In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." The Court concluded: "The Social Security Act is an attempt to find a method by which all public agencies may work together to a common end."

On the other hand, it is clear that state officials cannot be induced to pass an implementation plan by threat of the traditional coercive sanctions of fine or imprisonment. See District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), dismissed as moot in E.P.A. v. Brown, 97 S.Ct. 1635 (1977) after E.P.A. abandoned its policy. See also, National League of Cities v. Usery, 426 U.S. 833 (1965).

TYPES OF GOVERNMENTAL ENTITIES:

Interstate Governmental Organization:

a group of people each one of whom is an agent for a state or substate governmental entity who regularly exchange intelligence, coordinate activity or cooperate toward some common goal agreed on in advance.

Interstate Governmental Agency:

a group of people each of whom (no matter how or by whom appointed) is agent for no state or substate government but acts on behalf of an interstate governmental entity which may be an interstate agreed on entity or a federally imposed entity (ARC). An interstate governmental agency could represent an interstate governmental organization.

Forums:

(from B. Keenan and Wenston, *A Region's Energy and Environmental Future: Organization Options*, Background paper for Assembly on Intergovernmental Energy and Environmental Cooperation, p. 133). Forums perform intelligence and promotional but *not* prescriptive functions. They can be (1) purely interstate and either public, like the *Multistate Tax Commission*, or private, like the *National Electric Reliability Council* and its nine regional councils or (2) purely federal like the *Federal Regional Councils* or (3) a combination of federal and interstate such as the *Ohio River Basin Commission* (ORBC) mentioned on pages 25-28 below.

Catalysts:

(according to *Keenan and Wenston* [borrowing from M. Derthick, *Between Nation and State*, Brookings Institution, 1974]) a specific type of organization "devoted to changing the actions of the local, state and federal governments through a specific set of programs." *Multi-state regional catalysts* formulate "regional goals cooperatively with the states and the federal government." The catalyst agency like the "forum" serve intelligence and promotional functions *but a catalyst differs from a forum because it has money to spend to promote specific programs*. Therefore, promotion becomes *inducement* and conceptually its function stands somewhere between promotion and prescription. (See definition and discussion of "sanction" in this Glossary.) Two examples of multi-state regional catalyst agencies are the *Appalachian Regional Commission* (ARC) discussed in this study and the Regional Economic Development Commissions (Title V, Public Works and Economic Development Act of 1965).

Authorities:

are agencies with prescriptive, invocation or application power or some combination of the three. Examples of an interstate authority is the *Port of New York Authority* and ORSANCO established by interstate compact. An example of purely federal authority of a regional nature is the Tennessee Valley Authority (T.V.A.). Of course, the federal regulatory agencies such as the S.E.C., N.R.C. or the F.C.C. are purely federal authorities but of a national, not regional, nature. Examples of Joint federal-interstate authorities are the *Delaware River Basin Commission* and the *Susquehanna River Basin Commission* established by interstate compacts.

CHAPTER I. FEDERAL LAW: AS PART OF THE PROBLEM AND AS POTENTIAL SOLUTION

Section 1: Extant Federal Policy Creating the Need for Efficient Interstate Coordination of Electric Power Development.

Without being redundant to the 1977 ORBES study, Legal Analysis of Institutional Accountability for the Ohio River Basin, this section is a brief identification and description of the federal law relevant to this study, judicially developed doctrine as well as legislation. The present federal law affecting power development decisions is vast, complex and rapidly changing.* Whether a new federal law or legal institution is the best solution to the manifest need for the coordination of those decisions is problematic but there is no denying that existing federal law is one of the greatest causes of the need for interstate coordination. Therefore this section is included in this survey as an update and a compendium with some change in emphasis from the 1977 Study referred to above.

A. Catalogue of Laws:

Extant Federal Legislation Affecting Power Plant Development.

The Special Study Report for ORBES by N. L. White and J. F. Fitzgerald of May, 1977, entitled Legal Analysis of Institutional Accountability for the Ohio River Basin exhaustively surveyed federal and state law (except West Virginia and Pennsylvania) pertinent to ORBES. It will be referred to hereafter as "1977 Study" when cited with pagination indicated as "p. 1" or "p. 45", etc., omitting "III-E-" of the original. This is a brief compendium of that report, updated as of July, 1980. It is organized by the general labels "energy," "environmental" and "other" reflecting the two major policy areas of legislation with the catchall "other" for that which fits neither. Some legislation concerns both. It is classified under the label that seems to capture the major policy thrust of the legislation.

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*In recent years with the growth of federal regulation of many subjects "loose-leaf services" have developed to help the lawyer, bureaucrat and citizen to keep track of this swelling and changing tide of law. These "services" are loose-leaf books so that on a regular basis (weekly, monthly or quarterly) they can be updated by adding and deleting laws, administrative rules, interpretations, and decisions and judicial interpretations. The focus is on federal regulation but state regulation is also kept track of. The Environmental and Energy areas of regulation have generated such loose-leaf services. In Energy there is "Energy Law Service" published by Callaghan & Company, 3201 Old Glenview Road, Wilmette, Illinois 60091 and "Energy Users Report," published by The Bureau of National Affairs, Inc., 1231 25th Street, N.W., Washington, D.C. 20037. In Environment there is the "Environment Reporter" also published by the Bureau of National Affairs (BNA). To keep current with the continuing development in the areas surveyed here one needs only make a judicious use of these services.

Prescriptive Energy Legislation.

The main thrust of this rapidly proliferating body of legislation is energy efficiency. National security, foresight, and economy are the underlying motives. In more mundane terms, growing foreign dependency, scarcity and rising costs of energy sources are facts of life that have caused the rash of new legislation. The measures being taken are conservation of use and switching to alternative sources of energy which in the near term means switching to more plentiful fossil fuels or nuclear power (?) and in the long run means finding alternatives to fossil fuel and nuclear energy by encouraging technological and scientific development.

The National Energy Plan of December 1978 is in fact five acts, Public Laws 95-617 through 621 (92 Stat. 3117, 3174, 3206, 3289, 3350):

> Public Utility Regulatory Policies Act of 1978 (P.L. 95-617) has six titles of which Title I, "Retail Regulatory Policies for Electric Utilities"; Title II, "Certain F.E.R.C. and Department of Energy Authorities"; and Title III, "Small Hydroelectric Power Projects" are of some interest to this study. Title I establishes Federal standards for state utility rate-making creating a new section (2601 et seq.) of title 16 of the United States Code. Title II amends the Federal Power Act as to "interconnection" and "wheeling."
>
> Energy Tax Act of 1978 (P.L. 95-618) provides individuals and business with tax credits for the purchase and installation of energy conservation equipment and imposes a gas guzzler tax on auto makers based on fleet average. (42 U.S.C. § 6801 et seq.)
>
> National Energy Conservation Policy Act (P.L. 95-619) establishes a statutory energy conservation program for residential, school and hospital buildings and takes certain solar energy study initiatives. It contains (§§ 213 and 215) requirements for state residential energy conservation plans for "regulated utilities" (enforced by states) and for "non-regulated utilities" (enforced by Sec. of Energy) the main thrust of which is that utilities offer to inspect, arrange for installation and financing of energy conservation measures in private homes.
>
> Power Plant and Industrial Fuel Use Act of 1978 (P.L. 95-620) prohibits new facilities from using petroleum or natural gas (§ 212 lists Permanent Exemptions from this requirement because of fuel supply, site limitations, environmental requirements or lack of capital) and, where feasible, requires existing facilities that use oil or gas to convert to more abundant fuels. Section 602 provides for loans to assist power plant acquisition of air pollution control equipment and § 761 disallows delay or avoidance of compliance with applicable environmental requirements by reason of this act.
>
> The Natural Gas Policy Act of 1978 (P.L. 95-621) which completes the National Energy Plan, is probably already obsolete and, in any event, need not detain us here.

The Department of Energy Organization Act of 1977 (August) (P.L. 95-91, 91 Stat. 565), 42 U.S.C. § 7101 et seq., as the name suggests establishes the new department, provides for transfer of functions (primarily from the Federal Energy Administrator and ERDA) and creates the Federal Energy Regulatory Comm. (FERC) which replaced the FPC. No substantive policy is created by this act.

Energy Policy and Conservation Act of 1975 (P.L. 94-163, 89 Stat. 871), 42 U.S.C. § 6201 et seq. encourages the development of underground coal mines by guaranteeing loans (§ 6211) and creates the "Strategic Petroleum Reserve" (§§ 6231-6246). It gives the president certain emergency power and authorizes the Department of Energy to prescribe rules for improving energy efficiency (§§ 6291-6309) including encouraging and prompting State Energy Conservation Programs (§§ 6321-27).

The Emergency Petroleum Allocation Act of 1975 (P.L. 94-99, 89 Stat. 481) 15 U.S.C. § 751 et seq. This act together with the act it amends, the EPAA of 1973, (P.L. 93-155) was intended to grant the President specific temporary authority to deal with shortages of crude oil and its products in order to minimize adverse impact of such shortages or dislocations on the public and the economy.

Energy Supply and Environmental Coordination Act of 1974 (ESECA) (88 Stat. 246) as amended in 1975 by Title I and II of the Energy Policy and Conservation Act (P.L. 94-163, 89 Stat. 875, 960) 15 U.S.C. §§ 791-98. (See 1977 Study p. 9.) This act has been amended by the Power Plant and Industrial Fuel Use Act of 1978, see above and see § 762, "Effect of Orders Under § 2 of ESECA: Amendments to ESECA." What ESECA made discretionary as to conversion, PPIFUA makes mandatory.

Energy Conservation and Production Act (P.L. 94-385, 90 Stat. 1125) Titles II, III (Energy Conservation Standards for New Building Act of 1976) and part of IV (Energy Conservation in Existing Buildings Act of 1976) are collected under "Energy Conservation and Resource Renewal" at 42 U.S.C. § 6801 et seq. (See 1977 Study at pp. 11 and 12.)

Prescriptive Environmental Legislation.

Environmental legislation has had a longer history than energy legislation but even then the modern commitment is barely ten years old. Although there is earlier legislation that can be called "environmental", The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. is the cornerstone of the modern era. In form it is merely procedural. It establishes the Council on Environmental Quality (CEQ), to advise and assist the president, and the Environmental Impact Statement (EIS), a kind of "full disclosure" law, (see 1977 Study pp. 2 and 3) in order "to promote", "to stimulate", "to enrich understanding" to the end of "encouraging productive and enjoyable harmony between man and his environment" (code § 4321). The CEQ is without apparent prescriptive or adjudicative authority. But NEPA's "Congressional declaration of national environmental policy" (code § 4331) is a substantive mandate: "to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." (Code § 4331(a).) (Subpart (b) of this section lists six more specific goals.)

The key concept in NEPA is that the federal government must as far as is practicable, consistent with other policy goals, *improve* and *coordinate* its action "to create and maintain conditions under which man and nature can exist in *productive harmony*."

A "substantive mandate" means that merely filing an EIS for any "major federal actions significantly affecting the quality of the human environment" is not enough, the substantive policy implicit in NEPA must be met. That raises two difficult questions: (1) *who has authority to decide* whether or not the NEPA policy is met and (2) *precisely what is that policy* or, put another way, what is that policy in terms of rules or guidelines to direct the decision-maker in the individual case. The answer to the first question is somewhat complex: The agency proposing the action has the primary decision-making authority and the EIS means the agency is at least *aware* of environmental consequences and it is presumed it will obey the law, *i.e.*, NEPA substantive policy. But the EIS also guarantees Presidential or Congressional oversight of that decision at the behest of the *CEQ* (including E.P.A.), and other agencies or the public. Finally, the judiciary has oversight capacity under the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, especially §§ 701-06 at the behest of persons "injured in fact." (See discussion of "standing to sue" in Section 7.) It is this judicial oversight that causes people to think of NEPA as creating prescriptive substantive law. But judicial review of administrative action is generally very weak and very time consuming. (See discussion of "judicial review" in Section 7.) Nonetheless, to the ordinary citizen this seems to be the one certain access to what otherwise appears to be faceless, inaccessible governmental action. Even with their limited review, the courts have developed the idea of the substantive nature of NEPA. The conflict has been whether or not that NEPA standard of judgment is straight cost-benefit balancing analysis or, as suggested by § 4332(2)(D) and (2)(C)(iii), a "least adverse alternative" approach.[*] See, *The Least Adverse Alternative Approach* to Substantive Review Under NEPA, 88 Harv. L. Rev. 735 (1975) for an excellent brief (23 pages) discussion of this conflict. However, most judicial oversight is involved with the preliminary issue as to whether an EIS is required or adequate. The United States Code Annotated or the United States Code Service (U.S.C.S.) contains, following § 4332, abstracts from the hundreds of cases interpreting § 4332. Currently in U.S.C.S. with supplement, the annotations run to 57 pages.

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[*] These two approaches are simply two aspects of rationality which is always a balancing process. A simple example: It may be perfectly rational on a cost-benefit basis to pay $5,000 for a certain car, but if I have the alternative of buying the same car for $3,000 it's irrational to pay $5,000. However the problem with alternative analysis is that of determining whether the $3,000 car is the "same car." "Same car" could mean "the identical car," "a carbon copy," "the functional equivalent," or "close enough for real needs." When the analysis moves from the relatively simple and objective car-money balancing to the complex and unquantifiable facts and values of environmental vs. "other values" balancing, "alternative analysis," although "more rational" than simple cost-benefit analysis seems to many decision-makers too complex to bear. See pages 68-72 below.

Although NEPA is addressed to federal governmental action only, it also reaches much state action and private action either because of federal funding of state action (see § 4332(2)(D)) or the federal licensing of private action (e.g., Corps of Engineers permit to an electric utility for water intake and discharge facility). But state licensing of private development is not covered by NEPA.

Much state and private action is affected by the following federal environmental acts. What follows is not an exhaustive list. (See 1977 Study for such a list.) This is a very brief compendium of the major federal legislation, grouped by air, water and land quality protection laws, affecting power plant development.

The Clean Air Act is an agglomeration of many acts now codified at 42 U.S.C. §§ 7401 to 7642 and covering some 225 pages in the 1978 United States Code Service pocket supplement. (Formerly 42 U.S.C. § 1857 et seq.) (See 1977 Study, pp. 6-7, 165-66 (on State Implementation Plans, SIPs, p. 167.) See Bleicher, Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources, 89 Harv. L. Rev. 316 (Dec. 1975), just one of countless articles on this Act.

Federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. §§ 1151 et seq. especially § 1342 (National Pollution Discharge Elimination System (NPDES)) and § 1288 (Areawide planning called § 208 Plans) (See 1977 Study pp. 6-7.) This act is quite comprehensive and after the Clean Air Act is most crucial to interstate coordination of the power development effort. (See 1977 Study pp. 6-7 and p. 167.) While the Environmental Protection Agency (EPA) (established in 1970 by executive order under 5 U.S.C. § 906(a) authority for executive reorganization) has most of the regulatory and permit responsibility under F.W.P.C.A. and the Clean Air Act, the Army Corps of Engineers has certain permit authority as to physical obstruction affecting navigability under 33 U.S.C. § 403 (Protection of Navigable Waters and Harbors and River Improvements Generally, § 10 of an 1899 Act) and 33 U.S.C. § 1344 of F.W.P.C.A. Because both the Clean Air Act and F.W.P.C.A. provide for state implementation, the Corps is often the only direct federal involvement in power plant citing decisions.

The Solid Waste Disposal Act was substantially amended and reenacted by the Resource Conservation and Recovery Act of 1976 (P.L. 94-580, 90 Stat. 2795) and now appears under its original title in 42 U.S.C. §§ 6901 et seq. It creates the Office of Solid Waste within the E.P.A. (§ 6911-12) (See 1977 Study pp. 8-9.) This act authorizes E.P.A. to promulgate regulations identifying and managing hazardous wastes (see 40 Code of Federal Regulations Part 255) (§§ 6921-25), including the power to revoke even a state granted permit (§ 6928(a)(3)) or to impose a fine of $25,000 per day. Like the Clean Air Act and F.W.P.C.A. it authorizes (§ 6926(b)) and encourages, by financial assistance (§ 6931), state implementation of a state hazardous waste program as a replacement of the federal program. It provides for intrastate regional planning (but not interstate). All state plans must meet or exceed the federal standards. Ironically, one of the purposes of the 1976 act was in part required by the cleanup of the air and water. (The stuff has got to go somewhere!) (§ 6901(b)(3)). It, like the other environmental acts, provides for citizens suits (§ 6972) and judicial review (§ 6976).

Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87, 91 Stat. 447), 30 U.S.C. § 1201 et seq. There are other environmental acts (like the Safe Drinking Water Act (42 U.S.C. 300(f)) but the above list is the major legislation effecting power plant development.

Non-Prescriptive Federal Legislation.

Although this label may seem a contradiction in terms, this is a useful rubric for federal laws that authorize studies or that create agencies that are advisory only (like C.E.Q.), agencies that have no prescriptive legislation to enforce or power to make prescriptive rules. In other words although the legislation "prescribes" the creation of an agency or study, the agency created neither makes nor enforces rules.

Most of the prescriptive legislation Congress passes in the Energy and Environmental Area carries with authorization for further intelligence gathering but a few acts have been aimed exclusively at this function, for example:

Environmental Education Act, 20 U.S.C. § 1531 et seq. (1970) which sponsors educational programs on the importance of maintaining the ecological balance;

Water Resources Planning Act of 1964, 42 U.S.C. § 1961-1961 c-8 (1970) which provides for the training of scientists and supplementation of ongoing programs for research in water resource management.

B. Aspects of Federal Policy Creating the Coordinative Need:

The federal policy chiefly causing the need for interstate coordination is the policy of state implementation of national environmental standards. The state implementation is monitored by federal agencies but the federal agencies have only a limited authority to coordinate or cause the states to coordinate the implementation. Clean Air Act (as amended in 1977) § 126 provides for "Interstate Pollution Abatement" in state implementation plans (SIPs) at the behest of other states but the SIP complained of must violate (i.e., allow a source to violate) § 110(a)(2)(E)(i) which is designed to force state implementation plans to "contain adequate provision prohibiting any stationary source within the State from emitting any air pollutant in amounts which will prevent" another state from meeting or maintaining national primary or secondary ambient air quality standards (NAAQS) or from effectively using measures to prevent significant deterioration of air quality. Section 160(4) of Part C--"Preventing Significant Deterioration of Air Quality" also refers to one state's not interfering with another state's abatement program. Although these sections of the Clean Air Act might seem to give EPA, the federal monitor, authority to require that SIPs coordinate controls with other states, the mandate is certainly not to overall, comprehensive, or continuous coordination but for piecemeal concern only where an SIP allowed in-state source will prevent another state from actually meeting a standard--tendencies and lesser interstate impacts will not occasion EPA intervention.

The specific environmental problem seemingly most pressing for interstate solution is the long range transport of sulfur dioxides and sulfate particulates reported by J. Bromberg and T. Fox, Intergovernmental Cooperation in Up-Valley Pollution Transport Management, in Energy and Environment: An Intergovernmental Perspective, the final report of the Ohio River Valley Assembly. Moreover, according to allegations of Clifford L. Jones, Secretary of the Pennsylvania Department of Environmental Resources in a position paper presented to ORBES on October 24, 1979:

> "The economic impacts of interstate transport of air pollutants are also a major concern. Advected air pollution requires Pennsylvania to adopt stricter (than other states) emission limitations for its industry. As a result, a greater economic burden is placed on Pennsylvania industries and economic growth and development is discouraged. In addition, acid rain resulting from the long distance transport of SO_2 and NO_x may be responsible for substantial adverse effects on cropland, forest productivity, ... (etc.)"

Given the complexity of air pollution control, it would be very difficult for EPA to accomplish the necessary coordination to avoid these impacts on the piecemeal basis prescribed by the Clean Air Act. But regionalization within EPA makes it even more difficult. The ORBES states are in three different EPA regions. In order to coordinate within EPA, a Tri-Regional Task Force was established by Memorandum of Understanding. This is only for air pollution. EPA also has responsibility to monitor state implementation of water pollution and solid waste disposal policies. EPA in order to monitor the state enforcement of this complex legislation must itself establish elaborate functional and geographical divisions and then as the Tri-Regional Task Force bears witness--reorganize within itself to coordinate its own activities. Interstate coordination seems to get lost in this maze. States, naturally, are concerned with in-state impacts. Moreover, Congress has allowed relaxation of local environmental standards if "necessary to prevent significant local or regional economic disruption or unemployment . . ." § 125 (Clean Air Act Amendments of 1977). The Sulfur Dioxide Control in Ohio, Issues and History, dated October 17, 1979, by Reg. V. of U.S. E.P.A. details the difficulties inherent in the Congressional scheme.

Power plant siting itself is not subject to any public planning and the Federal Energy Regulatory Commission has no authority over siting, although it can now order wheeling. FERC has encouraged private utility site planning.

Not only do the environmental aspects of power plant development require interstate coordination, but its economic aspects are also interstate: the energy resource market, its transportation, the market for the electricity produced. Even the "local" economy affected by a new site is often interstate. But the present pressing need for interstate coordination is caused by the pervasive federal environmental and energy regulations the industry must deal with. While efficiency, reliability and adequacy of electrical energy production calls for an integrated interstate bulk power network, private utility coordination fostered and monitored by the F.P.C. (now F.E.R.C.) once seemed adequate to the task, in spite of the drama of an occasional power outage. But with the federal environmental/energy regulations of the past ten years, this no longer is true.

Section 2: Federal Law Solutions: Existing, Proposed and Potential.

A. Existing Federal Efforts at Interstate Coordination in the Electric Utility Industry:

There are four acts with their amendments that are implicated here: (1) The Federal Power Act of 1935 (49 Stat. 838) found in 16 United States Code (hereafter U.S.C.) § 791(a) et seq. but especially §§ 824, 824(a) (interconnection and coordination of (electric utility company) facilities) and 824(b) through 825(u); (2) The Public Utility Holding Co. Act of 1935, (49 Stat. 803) 15 U.S.C. § 79 et seq.; (3) The Antitrust Laws (primarily the Sherman Act, 26 Stat. 209) 15 U.S.C. § 1 et seq.; (4) The Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2133 et seq., with the Energy Reorganization Act of 1974 (88 Stat. 1253) 42 U.S.C. § 5801 et seq. especially the Nuclear Regulatory Commission, §§ 5841-49.

Under these provisions essentially all hydroelectric power facilities (16 U.S.C. §§ 797(e) §§ 817) and all nuclear power facilities (42 U.S.C. § 2235) are licensed and controlled by the federal government. Except for TVA, fossil-fuel burning electrical facility siting is controlled, if at all by the states, but the first three acts cited above have some direct impact on interstate coordination.

The Federal Power Act especially § 824(a)(1970) (§ 202(a) of the act) gives the Federal Power Commission (now the Federal Energy Regulatory Commission (FERC)) 42 U.S.C. § 7134 and §§ 7171-77 (part of Department of Energy Organization Act of 1977, P.L. 95-91) authority to "divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission and sale of electric energy" and under § 824a(b) (§ 202(b) of the Power Act) upon the complaint of state commission or a public utility, it can force a utility "to establish physical connection of its transmission facilities with the facilities of another person's (selling) electric energy (if it) finds such action necessary or appropriate in the public interest." But the Commission must find that "no undue burden will be placed upon the utility thereby" and the commission has "no authority to compel the enlargement of generating facilities" or "impair (the utility's) ability to render adequate service to its customers".

Moreover, as the Supreme Court noted in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the Commission lacked power under the 1936 act to order "wheeling," the electrical equivalent of a common carrier--not buying or selling power, just carrying it, "wheeling" it, on one's lines. This "defect" is remedied by amendment to the F.P.A. in the 1978 National Energy Plan (The Public Utility Regulatory Policies Act of 1978) adding Section 211 (16 U.S.C. 824(j)) "wheeling."[*] It should be noted that it empowers the commission to order "any other utility to provide transmission services to the applicant (*including any enlargement of transmission capacity necessary to provide such services*)." (Emphasis added.) (§ 211(a)) (§ 211(b) says "including *any increase* in transmission capacity . . . .")

Under new section 212 (16 U.S.C. 824K) the applicant for wheeling must stand ready to bear the cost of any enlargement of transmission facilities ordered under § 211(a) or (b).

But the act reiterates the old restriction: "The commission shall have *no* authority under § 210 or 211 *to compel enlargement of generating facilities*." (Emphasis added.)

These new sections taken together, especially the wheeling section, could add significantly to FERC's power to affect interstate coordination of power plant siting or development. See Breyer, *Analyzing Regulatory Failure*, *infra*, at p. 698. Of that power to affect coordination: A fairly detailed article *Breyer & MacAvoy, The Federal Power Commission and the Coordination Problem in the Electrical Power Industry*, 46 S. Cal. L. Rev. 661 (1973) suggests "that the Commission's planning activities have been ineffective, and that the Commission cannot realistically be expected to guide the planning activities of private power companies. Institutional solutions to energy production problems will have to take other forms." (at 663) The article states that "considerable practical difficulties, together with a number of legal problems and a tendency to respond only to the stimulus of immediate problems" have caused the FPC to fail to accomplish the coordination called for by its 1964 Survey. (*Id.* at 708.) In spite of the addition of the wheeling power, Breyer's general conclusions would probably not be altered. In a recent article, Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 549 (1979) he says (at 558) under heading "A. Typical Justifications for Regulation," "7. Rationalization":

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[*] Certain Wheeling Authority: Section 211. (a) Any electric utility or Federal power marketing agency may apply to the Commission for an order under this subsection requiring any other electric utility to provide transmission services to the applicant (including any enlargement of transmission capacity necessary to provide such services). Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order—

(1) is in the public interest
(2) would—
    (A) conserve a significant amount of energy
    (B) significantly promote the efficient use of facilities and resources, or
    (C) improve the reliability of any electric utility system to which the order applies, and
(3) meets the requirements of section 212.

(16 U.S.C. 824(j))

> Occasionally governmental intervention is justified on the ground that, without it, firms in an industry would remain too small, or would lack sufficient organization, to produce their product efficiently. (Citing 1973 article at 680-82, 685-87, 688-94.) One would ordinarily expect such firms to grow or cooperate, and unit costs to decrease. But often social or political factors act to counteract this tendency. (Citing F. Scherer, *Industrial Market Structure and Economic Performance*, 306-07 (1970).) In such circumstances, agencies have sought to engage in industry-wide "planning." In the 1960's for example, the (F.P.C.) argued that increased coordination in the planning and operation of electric power generating and transmission facilities would significantly lower unit costs. The Commission felt that environmental, political, regulatory, and managerial problems made it difficult for firms to plan jointly. The result was a relatively unsuccessful federal agency effort to encourage industry-wide rationalization.

See *Pennsylvania Water and Power Co. v. F.P.C.*, 343 U.S. 414, 421-26 (1952) discussing the F.P.C.'s interconnect power and see *Western Lgt. and Tele. Co.*, 33 F.P.C.R. 1147 (F.P.C. Opin. #462 1965) approving a merger to facilitate interconnection between Colorado and Kansas. F.E.R.C. has power under 16 U.S.C. § 246 to authorize mergers, etc.

Probably more important to the interstate coordination problem is F.E.R.C.'s power and duty under the Act (16 U.S.C. 824a(a)) to promote and encourage the "voluntary interconnection and coordination of facilities for the generation, transmission and sale of electric energy . . ." and to that end "to divide the country into regional districts." Pursuant to that power the Commission in 1965-68 called upon the industry to establish national and regional coordinating bodies. The National Electric Reliability Council (NERC) and nine regional reliability councils resulted. The reliability councils will be discussed further in section 8 on private efforts at coordination.

The F.P.C. opinion mentioned above suggests the connection the siting issue has with both the *Public Utility Holding Co. Act of 1935* and the *Antitrust Laws*. By the P.U.H.C.A. the *Securities and Exchange Commission* was given power over "Holding Companies." The SEC was directed to take action to require the breakup and simplification of existing holding companies' systems to insure that any remaining holding company system would constitute an "integrated public utility system." In Jones, *Regulated Industries* (1967) the author says (at 79) "the terms and structure of the statute are quite complex, encompassing numerous exemptions of various dimensions and provisions designed to coordinate federal and state regulation of the same utilities."

The *Antitrust Laws* are involved both in the merger of utility companies and in refusals to deal or cooperate with other utilities, which could be an attempt to monopolize, etc. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Supreme Court considered the applicability of section 2 of the *Sherman Act* (15 U.S.C. § 2) to a vertically integrated electric utility. *Otter Tail* has substantial generating facilities and an extensive subtransmission system in a tri-state service area. Beginning in 1960, several municipalities served by *Otter Tail* decided to operate their own local systems. *Otter Tail* refused to sell power to these municipalities at wholesale, or to allow its lines to be used for wheeling power to them from other suppliers. The Justice Department brought a civil action against *Otter Tail* under Sherman § 2, alleging monopolization and attempted monopolization of the retail distribution of electric power. The district court ordered them to sell at wholesale and to wheel. The Supreme Court affirmed (4-3). The major issue in the case is one generally discussed under the rubric of "primary jurisdiction," i.e., if more than one agency of government has jurisdiction over a regulated industry which one has "primary" jurisdiction which is both a question of first in time and first in legal power assuming two or more federal laws or regulatory schemes conflict.

The only thing worth mentioning here as to The Atomic Energy Act, is that the United States Court of Appeals for the Ninth Circuit has ruled that a California law that conditioned construction of nuclear power plants on existence of demonstrated nuclear wastes disposal technology regulates subjects impliedly preempted by A.E.A. and thus the state law is unconstitutional under the Supremacy Clause. "Preemption Doctrine" is discussed in Section 2 D (1) of this report. Pacific Legal Foundations v. State Energy Resources Conservation and Development Commission, 472 F.Supp. 191 (S.D. Cal. 1979).

B. Existing Federal Efforts at Interstate Coordination in Areas Other Than Electric Utility Development:

There is a paucity of federal legislation that attempts to coordinate state regulatory activity. On the other hand there is much federal legislation that directly and imperatively regulates interstate activity. Moreover, there is considerable federal legislation which endeavors to coordinate federal and state activity on a one to one basis, efforts at "cooperative federalism." For the purpose of discovering potential models, a scheme of possible federally initiated legal and institutional arrangements to achieve interstate coordination or cooperation in power plant development (excluding interstate compacts) is hereafter outlined with federal law examples of each listed where there is such law. This scheme lists the arrangements from roughly most federally centralized to least centralized.

(1). Complete federal control of interstate activity:

The examples from other areas that appear most analogous to the siting of power generating facilities are the Communications Act of 1934, (48 Stat. 1064) 47 U.S.C. § 151 et seq. and The Federal Aviation Act of 1958 as amended by the Airline Deregulation Act of 1978, (Pub. Law 95-504) 49 U.S.C. § 1301 et seq. Each of these acts involves fixed local facilities of substantial magnitude whose activities have substantial interstate consequences. In fact electric generating facilities have arguably more interstate consequences than either broadcasters or airports for not only does their product go interstate, (in a giant interstate bulk power grid system) but substantial air, water and (even) solid wastes go interstate, while the source of their electrical product, coal, oil, etc., is shipped interstate in huge quantities.

Other conspicuous examples of complete control are the National Labor Relations Act, and the Patent and Trademark Acts and various federal food and drug laws and labeling acts.

(2). Federal prescription of policy with federal financing but with the administrative body under control of each state:

The Unemployment Compensation system established by the Social Security Act, 42 U.S.C. § 301 et seq. (Titles IX and III dealing with Unemployment Compensation), is the most salient example of this federal-state cooperation. See Stewart Machine Co. v. Davis, 301 U.S. 548 (1937) discussed under "Sanctions" in Glossary of Terms.

(3). Federal primary policy with federal financing with state "secondary" prescriptive authority and state administration:

Each of the three principal environmental laws above, and the Surface Mining Control and Reclamation Act of 1977 and the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.) are conspicuous examples of this fairly common practice. "Secondary prescriptive authority" is either the right to set higher standards or more detailed standards or both. See 29 U.S.C. § 667 of O.S.H.A. for example. What often happens is that the federal minimums become maximums due to industry pressure on state government and state fears of losing industry if their regulations are stiffer vis-a-vis other states regulations. Obviously, for much the same reason, federal-state disputes can also arise over the more detailed regulations made pursuant to carrying out primary federal policy. Constant federal monitoring of the state implementation plans is thus required. See Comment, Jurisdiction to Review Informal E.P.A. Influence upon State Decision Making Under the Federal Water Pollution Control Act: Shell Oil Co. v. Train, 92 Harv. L. Rev. 1814 (1979).

(4). Federal policy mandating interstate coordination or cooperation but with primary policy development left to individual states:

With some caution I suggest that the Federal-Aid Highway Act of 1956 (70 Stat. 374) 23 U.S.C. § 101 et seq. which established the interstate highway system is a potential model. 23 U.S.C. § 103(e)(1) provides in part: "The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval of the Secretary (of transportation) . . . ." (Emphasis added.) If "primary policy" means the designation of the exact route of each highway, then states do make primary policy subject to fairly general federal guidelines. But the nature of the highways actually constructed and the implementation of the building program is subject to rather strict federal guidelines. The federal government induces state conformity with money, up to 95% of the construction costs. (23 U.S.C. § 120). By amendment in 1970 environmental, social, and economic factors were added to the list of federal guidelines to be obeyed by the state. This is in keeping with the spirit of NEPA. 23 U.S.C. § 109(h)(i) and (j) reads as follows:

> (h) Not later than July 1, 1972, the Secretary, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than 90 days after such submission, promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating

or minimizing such adverse effects and the following:

(1) air, noise, and water pollution;
(2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;
(3) adverse employment effects, and tax and property value losses;
(4) injurious displacement of people, businesses and farms; and
(5) disruption of desirable community and regional growth.

Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after the issuance of such guidelines.

(i) The Secretary, after consultation with appropriate Federal, State, and local officials, shall develop and promulgate standards for highway noise levels compatible with different land uses and after July 1, 1972, shall not approve plans and specifications for any proposed project on any Federal-aid system for which location approval has not yet been secured unless he determines that such plans and specifications include adequate measures to implement the appropriate noise level standards.

(j) The Secretary, after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended (42 USCS §§ 1857 and notes-1858a).

The interstate highway program has been an undoubted success given that one agrees with its goal of building a great interstate highway system which many in these energy scarce and environmentally conscious times now think was a mistake--it surely destroyed incentives to develop or even maintain urban, interurban, and rural mass transit. In fact the very success of this 1950's conceived program may be the failure of the 1970's and 1980's--but then who can plan 20 years ahead!

But regardless of its substantive success or failure, all will likely agree that as a venture in intergovernmental cooperation it has been a success. The federal government employed the states not as servants but as agents with substantial discretion to build a national interstate system. (However I remember as a state right-of-way agent working in Ohio in 1960 being frequently aware of the Bureau of Public Roads watching us--but at a distance.)

(5). Federal policy mandating interstate coordination but primary policy left to interstate regional control through:

(a) federal agency, federally appointed, such as the Federal Regional Council (see description below under (6)) but with either prescriptive clout or the authority and duty to resolve interstate differences with finality;

(b) federal agency but with both federal and state representatives such as the Ohio River Basin Commission (see below under (6)) but with powers as in (a).

There does not seem ever to have been such an agency.

(6). Federal nonprescriptive planning agency as a resource to facilitate interstate coordination:

Four such primarily "intelligence gathering" and "promotional" agencies will be briefly mentioned here.

The Ohio River Basin Commission was established by Exec. order #11578 of January 13, 1971, amended by exec. order in 1975 pursuant to power in Title II, "River Basin Commissions," of the Water Resources Planning Act of 1965, 42 U.S.C. 1962(b) et seq. Section 1962b(b) (§ 201(b) as enacted) states that the Commission shall be (1) "principal agency for the coordination of Federal, State, interstate, local and nongovernmental plans for the development of water and related land resources in its area." It then more specifically provides:

> (2) prepare and keep up-to-date, to the extent practicable, a comprehensive, coordinated, joint plan for Federal, State, interstate, local and nongovernmental development of water and related resources: Provided, That the plan shall include an evaluation of all reasonable alternative means of achieving optimum development of water and related land resources of the basin or basins, and it may be prepared in stages, including recommendations with respect to individual projects;

ORBC has in fact prepared its overall plan in 14 stages, one for each main tributary flowing into the main stem of the Ohio and then produced a comprehensive plan for the entire Basin.

> (3) recommend long-range schedules of priorities for the collection and analysis of basic data and for investigation, planning, and construction of projects; and
>
> (4) foster and undertake such studies of water and related land resources problems in its area, river basin, or group of river basins as are necessary in the preparation of the plan described in clause (2) of this subsection.

Its duties are further detailed in Section 204:

> DUTIES OF THE COMMISSIONS
>
> Sec. 204. Each river basin commission shall--
>
> (1) engage in such activities and make such studies and investigations as are necessary and desirable in carrying out the policy set forth in section 2 of this Act and in accomplishing the purposes set forth in section 201(b) of this Act;

> (2) submit to the Council and the Governor of each participating State a report on its work at least once each year. Such report shall be transmitted through the President to the Congress. After such transmission, copies of any such report shall be sent to the heads of such Federal, State, interstate, and international agencies as the President of the Governors of the participating States may direct;
>
> (3) submit to the Council for transmission to the President and by him to the Congress, and the Governors and the legislatures of the participating States a comprehensive, coordinated, joint plan, or any major portion thereof or necessary revisions thereof, for water and related land resources development in the area, river basin, or group of river basins for which such commission was established. Before the commission submits such a plan or major portion thereof or revision thereof to the Council, it shall transmit the proposed plan or revision to the head of each Federal department or agency, the Governor of each State, and each interstate agency, from which a member of the commission has been appointed, and to the head of the United States section of any international commission if the plan, portion or revision deals with a boundary water or a river crossing a boundary, or any tributary flowing into such boundary water or river, over which the international commission has jurisdiction or for which it has responsibility. Each such department and agency head, Governor, interstate agency, and United States section of an international commission shall have ninety days from the date of the receipt of the proposed plan, portion, or revision to report its views, comments, and recommendations to the commission. The commission may modify the plan, portion, or revision after considering the reports so submitted. The views, comments, and recommendations submitted by each Federal department or agency head, Governor, interstate agency, and United States section of an international commission shall be transmitted to the Council with the plan, portion, or revision; and
>
> (4) submit to the Council at the time of submitting such plan, any recommendations it may have for continuing the functions of the commission and for implementing the plan, including means of keeping the plan up-to-date.

Annually since its inception, ORBC has submitted such a report as required in § 204(2) and § 201(b)(3) "prioritizing" projects in the Ohio Basin.

Section 205 details a commission's "powers" and makes "administrative provisions"--which after stating it can hold hearings, acquire offices, having mailing privileges, hire personnel and use other state and federal personnel, have vehicles, ends with the catchall:

> (a)(8) incur such necessary expenses and exercise such other powers as are consistent with and reasonably required to perform its functions under this Act.

Then in § 205(b), the chairman (appointed by the President of the United States):

> is authorized to administer oaths when it is determined by a majority of the commission that testimony shall be taken or evidence received under oath.

Section 205 further provides:

> (c) To the extent permitted by law, all appropriate records and papers of each river basin commission shall be made available for public inspection during ordinary office hours.
>
> (d) Upon request of the chairman of any river basin commission, or any member or employee of such commission designated by the chairman thereof for the purpose, the head of any Federal department or agency is authorized (1) to furnish to such commission such information as may be necessary for carrying out its functions and as may be available to or procurable by such department or agency, and (2) to detail to temporary duty with such commission on a reimbursable basis such personnel within his administrative jurisdiction as it may need or believe to be useful for carrying out its functions, each such detail to be without loss of seniority, pay, or other employee status.
>
> (e) The chairman of each river basin commission shall, with the concurrence of the vice-chairman, appoint the personnel employed by such commission, and the chairman shall, in accordance with the general policies of such commission with respect to the work to be accomplished by it and the timing thereof, be responsible for (1) the supervision of personnel employed by such commission, (2) the assignment of duties and responsibilities among such personnel, and (3) the use and expenditure of funds available to such commission.

Section 206 provides for compensation of commission members: federal members continue to be paid by the department from which they come, state and compact members as the state or compact agency provides, with a special provision for the chairman.

Section 207 provides for financing the commission. This is done on an annual basis and the ratio has been 2.5-1, federal to state.

Section 202 provides for membership of commissions. ORBC has a chairman appointed by the president, ten federal agency representatives, ten state representatives (one from each state with waters draining into the Ohio) and Ohio River compact representatives, i.e., ORSANCO.

Section 203 "Organization of Commissions" provides for action by consensus or unanimity:

> (d) In the work of the commission every reasonable endeavor shall be made to arrive at a consensus of all members on all issues; but failing this, full opportunity shall be afforded each member for the presentation and report of individual views: Provided, That at any time the commission fails to act by reason of absence of consensus, the position of the chairman, acting in behalf of the Federal members, and the vice-chairman,

> acting upon instructions of the State members, shall be set forth in the record: Provided further, That the chairman, in consultation with the vice-chairman, shall have the final authority, in the absence of an applicable bylaw adopted by the commission or in the absence of a consensus, to fix the times and places for meetings, to set deadlines for the submission of annual and other reports, to establish subcommittees, and to decide such other procedural questions as may be necessary for the commission to perform its functions.

ORBC has only failed to reach such consensus three times in its history—each time as to specific projects, twice failing of consensus over the Blue Ridge Project on the New River in Virginia and once over a power plant siting.

ORBC has a citizen's advisory council with 198 members broken down into eight groups each with an area of interest relative to river development projects and planning: environmental, power, commerce and industry, agriculture, recreation, water supply and quality, transportation, and general interest. Each has 22 members, 2 private citizens from each state appointed by the chairman on the recommendation of the state representatives plus two at-large members.

ORBC has a staff of 18 permanent employees, 9 professionals (from hydrologist to economist) and 9 support personnel. The commission meets four times a year. It has taken on two special projects for the federal government. They involved studying all the water problems (supply, quality, energy, transportation, recreation, natural historic and flood control) of the Allegheny Basin and the Cumberland Basin.

ORBC plans and "prioritizing" are, of course, only recommendations to Congress and the States; they have no prescriptive effect.

The Water Resources Council is also established by this act (the W.R.P.A.) particularly §§ 1962a through 1962a-4. Its purpose is to maintain a continuing study and prepare an assessment biennially on water resources and to make a continuing study of regional plans and programs relating them to national needs.

The Appalachian Regional Development Act of 1965, establishing the Appalachian Regional Commission (ARC) (P.L. 89-4, § 1; 79 Stat. 5) 40 U.S.C. Appx. §§ 1 through 405. This act was originally scheduled to expire in 1971, then 1975, then October 1, 1979, and its life has again been extended. This is a "development" commission. There is one federal member, and one from each of the 13 states involved. The Appalachian Region is not coterminous with state boundaries but includes only the Appalachian area of each state. Only in West Virginia is that the whole state. Action by ARC takes a "yes" from the federal member and a "yes" from a majority of the state members. Expenses are 50% federal and 50% state paid. No state can participate in ARC programs unless it pays its share. ARC's functions include developing plans, conducting studies and sponsoring demonstration projects, reviewing local public and private development programs, formulating and recommending interstate compacts and other forms of interstate cooperation (including model legislation). It also must "encourage," "serve as a focal point" and "provide a forum." Specific development programs are authorized by the act in highways, health projects, land, timber, mining restoration, etc. Section 222 requires the consent of any state engaged in any program.

The Commission may also supplement federal grant-in-aid programs which would be available to the various states and entities within the region. (§ 3188a) Subject to limitation contained in § 3188a, the commission has the power and authority for:

1) planning a regional transportation network
2) to authorize transportation demonstration projects and
3) energy demonstration projects
4) health and nutrition demonstration projects
5) vocational and technical education demonstration projects.

Federal Regional Councils, 31 U.S.C. § 16 (Executive Order No. 11647). There are 10 federal regional councils each composed of the principal regional official of various agencies and departments, all federal, whose key function is to develop the most effective method of allocating federal resources to meet state and local needs. This is done by evaluation of agency programs and coordination of agency action.

The above list does not quite exhaust the list (federal ownership a la TVA is also possible but does not seem a viable option politically) and further combinations of the suggested arrangements are of course possible.

C. Past Proposals for Federal Law Solution of the Problem of Electrical Energy Facility Siting and Development not Designed to Specifically Promote Interstate Coordination:

Two administration proposed bills for power plant siting were discussed by Berlin, Gill, and Yarrington, Power Plant Siting--An Overview of Legislation and Litigation, 4 Environmental Reporter No. 8 (Monograph #15) June 22, 1973. On March 21, 1978, Congressman Udall introduced a bill to amend the Atomic Energy Act of 1954 to improve the nuclear siting and licensing process. It was to be called the "Nuclear Siting and Licensing Act of 1978." Discussion of all three acts and excerpts from the 1978 and 1973 acts follow.

(1). General summary and discussion:

The two administration sponsored bills were the Power Plant Siting Act of 1971 (S. 1684) and Electric Facilities Siting Act of 1973 (S. 935) (HR 4874). Two other bills were introduced in 1971 and four others in 1973.

The 1973 Bill's preamble asserted: "A BILL to assure protection of environmental values while facilitating construction of needed electrical power supply facilities, and for other purposes."

The 1973 and 1971 bills have these main features in common:

1. Long-term planning by utilities for plant siting with the disclosure of potential alternative sites to those proposed;

2. Establishment of state certifying agencies as an alternative to direct federal licensing;

3. Federal monitoring for environmental effects;

4. Full public disclosure.

They differ as to (1) federal agency in charge, (2) public hearing requirements and (3) so-called "grandfather clause" or effects-on-existing-activity aspects of the legislation. These raise important issues that must be dealt with but are essentially questions of detail not substance. The substance of the 1973 bill is as follows:

I. Long-Range Planning (about 10 years)

   A. Under regulations prepared by FPC.

   B. Content of Report (filed annually):

      1. general location, size, and type of facility planned for construction within 10 years;

      2. identify all existing facilities to be removed from service;

      3. the location of tentative future sites and potential alternative sites;

      4. information about identified sites, transmission lines, and facilities and their environmental impact and planned measures to minimize these impacts;

      5. describe coordination effort with:

         a. other utilities;

         b. federal and state environmental agencies.

      6. other information requested by state certifying agency or FPC might request.

II. Certifying Agencies

Within two years, state must designate an agency with authority to certify sites and facilities. It can be a state agency (new or existing) or interstate regional agency. The designated agency must be approved by the Sec. of Interior. If no state agency were determined to be qualified within the date of enactment, or if its order was revoked, the Secretary would have exclusive authority to carry out the functions of the state agency.

In addition a Federal Electric Facilities Siting Panel, composed of Interior (Energy), A.G., E.P.A., FPC (FERC), AEC (NRC), and other federal agency representatives whose function would be to:

(a) draw up a federal application form--"the sole application for all necessary federal applications;"

(b) help the state certifying agencies draw up a consolidated application form which would be the only application necessary for all governmental applications--federal, interstate regional, state, and local;

(c) expedite and coordinate federal agency review of applications for construction and state agency environmental impact assessments;

(d) transmit to Secretary a "notice of issuance of required authorization" or denial, by each panel agency.

III. Certification of Sites

A. Required before construction can begin:

1. state agency certification (or federal where no state);

2. federal notice of authorization.

B. Time of application for approval of a specific facility construction:

1. 3-5 years of planned date of construction;

2. included in annual long-range report at least two years before application;

3. alternatives in annual report at least one year before application.

C. State and federal agencies have 18 months to approve or disapprove.

D. Utility can petition Sec. of Interior if agencies fail to act timely or conclusively.

E. Substantive standard for issuance:

1. site or route will not unduly impair "important environmental values" and

2. is reasonably necessary to meet electric power needs.

Obviously the reporting of alternatives indicates this balancing process should be of the "alternatives analysis" not "straight cost-benefit" variety. (See Note p. 14 and pages 68-72 below.)

Congressman Udall's H.R. 11704, Nuclear Siting and Licensing Act of 1978 was introduced in the Senate by Senator Hart as S. 2775. It would establish a revised and streamlined process for the licensing, siting, construction and operation of nuclear power plants. The substance of the bill is as follows:

I. Certifying Agency

   A. Nuclear Regulatory Commission authorized to grant siting, construction, manufacturing, and operating permits.

   B. Upon Commission Request review of any application undertaken by Advisory Committee on Reactor Safety (see Advisory Committee on Reactor Safeguards).

   C. Any or all NRC responsibilities may be assumed by a State or Interstate organization with a program for evaluation of acceptability of proposed facilities approved by NRC.

II. Certification of Sites

   A. Required before construction may begin.

   B. Site permit may be issued 10 years prior to filing of an application for a construction permit or a combined construction permit and operating license.

   C. Preparation of site for construction is permitted prior to application for a construction permit.

   D. Issuance of Permits

      1. Construction permits or combined construction permit and operative license issued after State where facility would be located certifies to NRC the specific need therefore.

      2. Interim operating license may be issued prior to hearing up in a showing of an urgent public need or emergency provided that a site-specific issue has been previously heard.

III. Opportunity for Hearing and Review

   A. Full opportunity for hearing on any issue except if there has been an opportunity for a hearing in a prior NRC or State proceeding.

      1. Hearing only upon request of an interested party

         a. proceeding to amend or renew a site permit;

         b. proceeding to suspend, revoke, amend, or renew an approved standardized design.

2. Hearing irrespective of request--proceeding to obtain a combined construction permit and operating license, a site permit, or the approval of a standardized facility design.

B. No Commission Review or Federal Court Review of Matters Reviewed Under an Approved State Program.

There have been several other recent unsuccessful efforts to introduce comprehensive energy facility siting as land use planning legislation as follows:

1) Energy Facilities Planning and Development Act of 1975 (originally Title 8 of President Ford's Omnibus Energy Bill, "The Energy Independence Act of 1975.")(S. 619).

2) Land Resource Planning Act (1975)(S. 984).

3) Electric Utility Rate Reform and Regulatory Improvement Act (1976)(Title V)(H.R. 12461).

(2). Excerpts of pertinent parts of the 1973 and 1978 proposals:

The 1973 Proposal:

Section 1.

This Act may be cited as the "Electric Facilities Siting Act of 1973."

FINDINGS AND PURPOSES

Section 2.

The Congress, in furtherance of the national environmental policy as set forth in the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4321) and the national electric energy policy as set forth in section 202(a) of the Federal Power Act (49 Stat. 848; 16 U.S.C. 824(a)), hereby finds and declares the national public interest in the environment, the interest of interstate commerce, the interest of public and private investors in electric utility facilities, and the interest of consumers of electric energy require—

(a) that electric facilities adequate to the Nation's need for a reliable electric power supply be constructed upon a timely basis, and in a manner consonant with the preservation of important environmental values and wise comprehensive use of the Nation's air, land, water, and other resources for all beneficial purposes public and private;

(b) that all of the Nation's electric utilities should be required to engage in adequate open long-range planning, and certifying bodies should be established for the expeditious preconstruction review of electric facilities and related sites in order to avoid undue delays in the construction of needed electric facilities and to provide for full and timely consideration of environmental consequences in advance of such construction;

(c) that appropriate electric facilities and related sites should be subject to expeditious coordinated approval at the Federal and State levels.

LONG-RANGE PLANNING

Section 4.

(a) Each electric utility and Federal electric utility shall prepare annually its long-range plans for electric facilities during the ensuing ten years, or for such other period as the Federal Power Commission shall specify. These plans shall be public and shall be completed pursuant to rules and regulations established by the Federal Power Commission as a part of the work of the Commission and of the national and regional electric reliability councils under section 202(a) of the Federal Power Act. These plans shall be part of a coordinated regional plan and shall:

(1) describe the general location, size and type of all electric facilities to be owned or operated by each reporting utility, the construction of which is projected to commence during the ensuing ten years or during such other period or upon completion of construction of the projected electric facilities;

(2) identify the location of tentative or alternate sites for the construction of future electric facilities over such period as the Commission may specify, including an inventory of electric power generating sites and the general location of associated electric transmission line routes and state the relationship of the identified sites, routes, and facilities, to environmental values, describing how potential adverse effects on such values will be avoided or minimized through the reporting utility's long-range planning process;

(3) reflect and describe such utility's efforts to coordinate the electric facility plans identified therein with those of other utilities so as to provide a coordinated regional plan for meeting the electric needs of the region;

(4) describe the reporting utility's actions to involve environmental protection, air, water, and land-use planning agencies, in its long-range planning process so as to identify and minimize environmental problems at the earliest possible stage in the long-range planning and reporting process; and

(5) supply such additional information as the appropriate State certifying agency, the Secretary, or the Federal Power Commission may, from time-to-time, prescribe upon the advice of interested State and Federal agencies to carry out the purposes of this Act.

Public Notice of Plans

(b) Each electric utility and Federal electric utility shall give initial public notice of the plans referred to in subsection (a), by filing through its *regional electric reliability council*, or individually if not a member of a reliability council, annually a copy of such plans, together with its projections of demand for electricity that the facilities would meet with the appropriate State certifying agency, the Secretary, the Federal Power Commission, the Environmental Protection Agency, and such other affected Federal, State, regional, and local governmental authorities and citizens' environmental protection and resource planning groups requesting such plans. (Emphasis added.)

* * *

Judicial Review

(d) Any State dissatisfied with the Secretary's action with respect to an order of qualification may appeal to the United States Court of Appeals for the circuit in which such State is located, with service of summons and notice of appeal at any place within the United States, and the court shall have jurisdiction to affirm the Secretary's action, to set it aside in whole or in part, and for good cause shown, to remand the case to the agency for further deliberation: Provided, That the Secretary's findings of fact supported by substantial evidence shall be conclusive: And provided further, That any judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code. Upon the filing of an appeal, the Clerk of the Court of Appeals shall forthwith transmit a copy of the notice to the Secretary who shall file with the court the record upon which the appealed action was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of the record, the jurisdiction of the court shall be exclusive.

Section 5.

Designation of State Certifying Agencies (Omitted)

CERTIFICATION OF SITES AND FACILITIES

Section 6.

(a) Effective three years from the date of the enactment hereof:

(i) no electric utility shall commence to construct or begin operation of an electric facility within a State unless it has received a certificate issued by the certifying agency and a Federal notice with respect to such facility; and

(ii) no Federal electric utility shall commence to construct or begin operation of an electric facility unless it has received from the Secretary a certificate and a Federal notice with respect to such facility.

Such facilities shall be constructed in accordance with the terms and conditions of the certificate and Federal notice. No certificate or Federal notice is required for electric facilities already in operation on said effective date or for electric facilities already under construction for which a sizable investment has been made as determined by the certifying agency. No certificate or Federal notice shall be required to begin operation of an electric facility, if a certificate and Federal notice had been received with respect to construction of such facility. (Emphasis added.)

Time for Filing

(b) All applications by an electric utility and a Federal electric utility for a certificate and a Federal notice shall be filed with the appropriate certifying agency not more than five nor less than three years prior to the planned date of commencement of construction of the affected electric facility and such plans may be subject to reasonable modification during the period of review. Except for good cause shown, any site for which certification is sought and the approximate date on which the application for a certificate will be filed, shall have been specified in the electric utility's long-range plans and in the certifying agency's annual compilation not less than two years prior to the date of application. Any alternative to a site so identified, whether proposed by the certifying agency or by any other person, shall be so proposed not later than one year before the utility's specified date of application. Where the proposed site is so identified in advance, only the alternative sites so specified by the electric utility or the Federal electric utility, by the certifying agency or by other persons shall be considered by the certifying agency, together with the full range of alternatives for the electric facilities which the certifying agency may consider under section 7.

Time for Action on Proposed Site

(c) As expeditiously as possible but in no event later than eighteen months after receipt of the complete application, the certifying agency shall issue or deny the certificate and the Secretary shall transmit the Federal notice or inform the applicant that it will not be transmitted because of a denial of one or more required Federal authorizations. All Federal, State, interstate, or local departments or agencies having authority relative to issuance of the required certificate, or the Federal notice or other Federal, State, interstate, or local authorizations shall act within such eighteen months period.

(d) The provisions of section 5 and subsection (a)(1) of this section notwithstanding, any electric utility may petition the Secretary for a certificate based upon the utility's showing of a failure of a State certifying agency to act upon a timely or conclusive basis with respect to any application, and that as a result the public interest in an adequate and reliable regional bulk power supply imperatively and unavoidably requires a decision with respect to such certification. The Federal Power Commission shall prescribe by regulation the facts necessary to constitute the basis of such showing. Such applications shall be referred to the Federal Power Commission, and if it makes a finding that failure to act in a timely or conclusive manner will harm the public interest in an adequate and reliable bulk power supply, the Secretary shall, effective upon the date of such finding, have exclusive jurisdiction to act on the application for a certificate. The Secretary shall accord priority to all petitions for certificates filed under this subsection and shall resolve them in accordance with the provisions of section 7.

(e) Each certifying agency shall develop with the Panel a consolidated application form, which shall include the application form in subsection (f) and shall be the sole application necessary for all governmental authorizations, Federal, State, interstate, or local. The application shall include the applicant's environmental impact report to aid the certifying agency in complying with subsection (g) of this section. The applicant shall file the application with the certifying agency and with the Federal Electric Facilities Siting Panel established pursuant to subsection (f) of this section.

Siting Panel Created

(f) There is hereby established in the Department of the Interior a Federal Electric Facilities Siting Panel. The Panel shall include the Secretary of the Interior, who shall act as chairman, the Attorney General, the Administrator of the Environmental Protection Agency, the Chairman of the Federal Power Commission, or their designees, and representatives of other Federal agencies the approval of which is required in order to construct or operate the electric facility for which a certificate is sought. The Panel shall include the Chairman of the Atomic Energy Commission or his designee with respect to applications for nuclear facilities. The Panel is directed:

(i) to develop a unified Federal application form which shall be the sole application for all necessary Federal authorizations;

(ii) to develop with each certifying agency for use in its jurisdiction a consolidated application composed of the unified Federal application form and the certifying agency's application form;

(iii) to expedite and coordinate Federal reviews of applications under subsection (a) of this section;

(iv) to provide highest priority to electric facility applications being considered pursuant to subsection (d) of this section;

(v) to expedite and coordinate Federal participation in the preparation and review of the environmental impact statement required under subsection (g) of this section; and

(vi) to assemble and transmit to the Secretary, as chairman of the Panel, a notice of issuance of required authorization or denial thereof by each Federal entity represented on the Panel.

(g) The certifying agency shall prepare a detailed statement meeting the requirements of section 102 of the National Environmental Policy Act of 1969 and guidelines of the Council on Environmental Quality.

(h) For a period of forty-eight months from the date of enactment of this Act, the certifying agency may waive the requirements of subsections (a), (b), (c), or (g) of this section upon a showing of good cause by the electric utility or Federal electric utility or on its own motion when an application pursuant to this Act is filed: Provided, however, That if the requirements of subsection (g) are waived the requirements of section 102(2)(C) of the National Environmental Policy Act shall apply to all Federal agencies. In the event of a natural disaster at any time the requirements of subsection (b) may be waived by the certifying agency with respect to transmission lines.

Reopening Certifying Process

(i) Upon a showing by an electric utility or a Federal electric utility of changed circumstances requiring significant modifications in the design characteristics of a facility for which a certificate has been issued, the certification proceedings may be reopened to consider changes necessary in the certificate to accommodate the proposed modifications. The appropriate certifying agency shall limit the scope of issues before it to those directly related to the proposed modifications. In the event that the certifying agency modifies any of the provisions of the certificate, the remaining provisions shall continue in force.

(j) Notwithstanding the requirements of this section with regard to the time periods for submission of application for certification under this Act in advance of planned commencement of construction, construction may begin on any electric facility certified under this Act sixty days after issuance of the appropriate certificate, subject to such legal requirements as may be otherwise determined through the exercise of judicial review pursuant to section 13.

Section 7.

Standards for Certifying A Site

(a) The certifying agency is authorized to issue a certificate of site and facility if such body finds, after having considered the environmental and economic costs and benefits of the facility if constructed on the site proposed by the utility or any alternative sites proposed thereto within the limitations of section 6(b); the impact of the use of the site or such alternative sites on any applicable land-use program; the availability of fuels; the need for electric power, including adequacy and reliability of electric power supplies; and other relevant factors, that the use of the site or route will not unduly impair important environmental values and will be reasonably necessary to meet electric power needs. If the certifying agency determines not to issue a certificate for the electric utility's or Federal electric utility's proposed site it may issue such a certificate for the construction of a facility on one of the alternative sites considered. If the certifying agency chooses to issue a certificate for a site other than that proposed by the electric utility or Federal electric utility, it must first find that the utility's site is unacceptable under the provisions of this subsection. The judgment of such certifying agency shall be conclusive on all questions of siting, land use, public convenience and necessity, aesthetics, and any other State or local requirements. Compliance with air and water quality requirements shall be determined by the duly authorized State, interstate, or Federal air or water pollution control agencies. In the issuance of such certificates the certifying agency may impose such reasonable terms and conditions as it deems necessary. The certificate shall show the applicant's action to meet the objectives of section 202(a) of the Federal Power Act regarding reliability and adequacy of service. Such certificates, when issued, shall be final and subject only to judicial review pursuant to section 13.

(b) The certifying agency shall assure full public review and adequate consideration of all environmental values, including the impact on adjacent States, available alternatives, and other relevant factors bearing on whether the objectives of this Act would be best served by the issuance of the certificate, consideration of which has not been reserved to other agencies by Federal statute or subsection (a).

(c) The certifying agency shall, within sixty days after it has published notice of receipt for an application under this section, make a finding as to whether there is significant public controversy concerning the electric facility. *If the certifying agency finds there is significant public controversy concerning the electric facility, it shall conduct a public hearing as part of its certification process.* (Emphasis added.) If the certifying agency finds there is no significant public controversy, it shall continue its certification process pursuant to subsection (a) but shall not conduct a public hearing.

EMINENT DOMAIN

Section 9.

An electric utility holding a certificate which cannot acquire by contract, or is unable to agree with the owner (other than the United States Government), of property as to compensation to be paid for the necessary rights-of-way or other property needed for certified electric facilities, may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. In any proceeding brought in the district court of the United States, the petitioner may file with the petition or at any time before judgment, a declaration of taking in the manner and with the consequences provided by sections 1, 2, and 4 of the Act of February 26, 1931 (46 Stat. 1421-1422; 40 U.S.C. §§ 258a, 258b and 258d), and the petitioner shall be subject to all of the provisions of said section which are applicable to the United States when it files a declaration of taking hereunder.

CONGRESSIONAL CONSENT TO INTERSTATE AGREEMENTS

Section 10.

The consent of the Congress is hereby given to two or more states to negotiate and enter into agreements or compacts not in conflict with any law or treaty of the United States for cooperative effort and mutual assistance in certificating electric facilities and related sites, for the enforcement of their respective laws thereon, and for the establishment of such authorities or agencies, joint or otherwise, as they may deem desirable for implementing such agreements or compacts. The right to alter, amend, or repeal this section is expressly reserved.

JUDICIAL REVIEW

Section 13.

Any person who is aggrieved or adversely affected by any final order of the Secretary or any State certifying agency or any other Federal, State, interstate, or local department or agency disposing of an application for a certificate, Federal notice or other required authorization relative to electric facilities for which a certificate is sought, by issuance or denial thereof, may appeal within sixty days thereafter to the United States Court of Appeals for the circuit in which there is located the principal place of business of the applicant electric utility or Federal electric utility, with service of summons and notice of appeal at any place within the United States, and the court shall have exclusive jurisdiction to affirm the action of the Secretary or State certifying agency or other Federal, State, interstate, or local department or agency or to set it aside in whole or in part and for good cause shown, to remand the case for further deliberation: Provided, That scope of such review shall be limited to setting aside action which the court finds was arbitrary, capricious, or an abuse of discretion: And provided further, That any judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code. Upon the filing of the record, the jurisdiction of the court shall be exclusive. (Emphasis added.)

OTHER AFFECTED LAWS

Section 14.

(a) The provisions of this Act shall in no way alter or otherwise affect the jurisdiction of the council on Environmental Quality or the requirements of the National Environmental Policy Act of 1969 except that a single detailed statement shall be prepared in connection with each certificate by the certifying agency and circulated in compliance with the Guidelines of the Council on Environmental Quality. Such statement shall fulfill the responsibilities of all participating Federal agencies under section 102(2)(C) of that Act with respect to the proposed facilities.

(b) Except as provided in this Act any present requirements arising from any Federal law, which may be applicable to any natural person, artificial person, or interest of government, Federal or State shall continue to apply.

The 1978 Proposal to amend the Atomic Energy Act:

Pertinent excerpts of the proposed legislation are as follows:

"H.R. 11704, A Bill to amend the Atomic Energy Act of 1954, as amended, to improve the nuclear siting and licensing process, and for other purposes.

Section 202.
The Atomic Energy Act of 1954, as amended, is amended by adding a new section 195 to read as follows:
Section 195.
State Environmental Reviews--
"a.
"(1) Upon the filing of an application for a site permit, construction permit, or combined construction permit and operating license for a thermal neutron power generation facility, whichever is filed first, the Commission shall within ten days notify the State within which the facility is proposed to be located. A State may elect to determine the environmental acceptability of and/or need for proposed thermal neutron power generation facilities or proposed sites for such facilities with specified general site-related design characteristics. Within sixty days after receipt of such notice, the State shall notify the Commission whether it has made or will make any or all of the evaluations and determinations provided for by this section, and whether it has a program, approved by the Commission under subsection e., for making such evaluations and determinations.

"(2) If the Commission receives notice that the State will make all the determinations provided for by this section and has an approved program:

"(A) it shall not issue the site permit, or combined construction permit and operating license for the facility, whichever is requested first, unless it is notified by the State that the State has determined that in the case of a construction permit or combined construction permit and operating license, construction and operation of the thermal neutron power generation facilities will be environmentally acceptable or, in the case of a site permit, that the State has determined that construction and operation of the thermal neutron power generation facilities with specified general site-related design characteristics will be environmentally acceptable; and

"(B) it shall not issue a construction permit or combined construction permit and operating license for the facility unless it is notified by the State that the State has determined that there is a need for the facility.

"(3) If the Commission receives notice that the State will make some of the evaluations and determinations provided for by this section and has an approved program:

"(A) it shall not, in the case of a site permit, construction permit, or combined construction permit and operating license for the facility, whichever is requested first, determine that in the case of a construction permit or combined construction permit and operating license construction and operation of the thermal neutron power generation facilities will be environmentally acceptable or, in the case of a site permit, determine that construction and operation of the thermal neutron power generation facilities with specified general site-related design characteristics will be environmentally acceptable, until it has received from the State such evaluations and determinations as the State has elected to make; and

"(B) it shall not, in the case of a construction permit or combined construction permit and operating license, determine that there is a need for the facility, until it has received from the State such evaluations and determinations regarding the need for the facility as the State has elected to make.

"(4) Evaluations and determinations shall be made by a State under this section in accordance with the National Environmental Policy Act of 1969, as amended.

"(5) Evaluations and determinations made by a State under this section and under its approved program shall not be subject to further review by the Commission and shall not be subject to challenge either before the Commission or in a Federal court review of Commission action under the National Environmental Policy Act of 1969, as amended.

"b.

"(1) Notice from a State to the Commission that it has made or will make all the determinations provided for by this section and has a program, approved by the Commission, for making such determinations, will discharge the Commission from its responsibilities under the National Environmental Policy Act of 1969, as amended, with regard to such determinations.

"(2) Notice from a State to the Commission that it has made or will make some of the evaluations and/or determinations provided for by this section and has a program, approved by the Commission, for making such evaluations and determinations, will discharge the Commission from any of its responsibilities under the National Environmental Policy Act of 1969, as amended, to prepare an assessment of those discrete aspects of environmental acceptability and/or need for power covered by such evaluations and/or determinations. The Commission shall use the evaluations and determinations prepared by a State under this section in discharging its remaining responsibilities under the National Environmental Policy Act of 1969, as amended.

"(3) If no notice is received within sixty days by the Commission, as provided in subsection a., then the Commission shall have the exclusive authority, except as provided by section 185 a. and b., as against the State, to determine whether the thermal neutron power generation facilities will be in compliance with the National Environmental Policy Act of 1969, as amended.

"c. If a State has made some or all of the evaluations and/or determinations provided for by this section with respect to proposed thermal neutron power generation facilities or proposed sites for such facilities, then the provisions of this section shall apply with respect to such evaluations and determinations to each successive application with respect to the same facilities or site. The ongoing responsibilities of any State with a program approved under subsection e. of this section for such evaluations and/or determinations under the National Environmental Policy Act of 1969, as amended, shall be the same as those of the Commission with respect to any application for a facility proposed to be located in a State that does not have a program approved under subsection e. of this section.

"d. Nothing in this section shall affect in any way the Commission's authority to protect the public health and safety and the common defense and security pursuant to the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended, or be construed as vesting the States with any such authority not contained in existing law. If notice is received by the Commission that a State will make all the determinations provided for by this section and has an approved program, the Commission shall, pursuant to the provisions of the National Environmental Policy Act of 1969, as amended, assess the environmental aspects of radiological safety impacts of the operation of the facility and prepare and forward to the State a statement of its analysis and conclusions of the nature and extent of such impacts. The State shall include the radiological safety impacts as set forth by the Commission in its statement of conclusions in the State's determination regarding environmental acceptability provided for by this section. The Commission's statement of conclusions of the nature and extent of radiological impacts shall not be subject to review in any State administrative or judicial proceeding.

"e. The Governor of any State electing to make any or all of the evaluations and determinations provided for in subsection a. of this section shall submit a program for making such evaluations and determinations to the Commission for review and approval. The Commission is authorized to approve a State program in whole or in part and to specify for which evaluations and determinations a State program is approved. The Commission is authorized, in consultation with other Federal agencies and the States, to establish guidelines for use in reviewing the State programs. Any State program approved under this section shall include:

"(1) provisions to assure compliance by the State official or officials who administer the program with the National Environmental Policy Act of 1969, as amended, including consent by a State official to assume the status of a responsible federal official within the meaning of such Act and authority for and consent by the State official to accept the jurisdiction of the Federal courts for the purpose of enforcement and review of responsibilities under such Act;

"(2) provisions to assure that the State will give reasonable consideration to economically feasible alternative sources of power, including but not necessarily limited to conservation, solar energy, coal-fired generating plants, and other technologies and that, with respect to an application for a site permit, the State will find a generic need for power as provided in section 193 f.;

"(3) provisions to assure that the State will have adequate resources and expertise to consider environmental impacts of and/or the need for proposed facilities. State determinations regarding environmental acceptability shall include all relevant environmental considerations, including decisions on certifications and discharge permits under sections 401 and 402 of the Federal Water Pollution Control Act, as amended, decisions on certification concurrences under section 307 of the Coastal Zone Management Act of 1972, as amended, and any other State decisions required by Federal or State law to prevent or mitigate environmental impacts from siting, construction, or operation of the thermal neutron power generation facilities;

"(4) provisions to assure open and early public participation, including provisions for hearings on final determinations under this section, under procedures comparable to those that would be employed for such determinations by the Commission;

"(5) provisions to assure that coordinated and timely decisions are reached to carry out the purposes of the Act with respect to the issuance by the Commission of site permits, construction permits or combined construction permits and operating licenses, including the establishment of a schedule for completing the evaluations and/or determinations provided for by this section;

"(6) provisions to assure that where more than one State agency is involved, an agency is designated to coordinate, direct and combine the review of all of the involved agencies and to cooperate with Federal authorities to insure adherence to the schedule established under paragraph (5);

"(7) provisions to assure coordination with related Federal reviews and for mutual assistance between Federal and State agencies to avoid duplication;

"(8) provisions to assure that, if the State elects to assume less than full responsibility for determining the environmental acceptability of and need for the thermal neutron power generation facility, the State, in consultation with the Commission, shall coordinate its evaluations and determinations with those of the Commission in order that the Commission may in a timely fashion make the determinations required by the National Environmental Policy Act of 1969, as amended; and

"(9) provisions to assure consideration of regional factors in determining environmental acceptability and need for power and that there is opportunity for participation of adjacent States, when affected.

"f. States are encouraged to establish and participate in interstate or regional organizations which, among other things, may discharge the State's responsibilities for determining need for power and/or determining whether the thermal neutron power generation facilities will be environmentally acceptable or evaluating such discrete, limited aspects thereof as the Commission may permit. Upon notice by a State to the Commission that such a regional or interstate organization is designated to act for it, the provisions of this section shall be applicable to that organization.

"g.

"(1) The Commission is authorized to review any program approved under this section and the performance of each State.

"(2) The Commission shall have the authority to suspend or terminate any financial assistance extended under this section and to suspend or terminate its approval of a State program if:

"(A) it determines that the State is failing to adhere to the program approved by the Commission; and

"(B) the State has been given notice of the proposed termination and withdrawal and given an opportunity to demonstrate compliance with its program.

"(3) If a State program is terminated or suspended, the appropriate Federal agency may take into account such record as may have been established in any proceeding pending at the time of termination or suspension, so as to avoid undue delay and duplication of State actions.

"h. States with programs approved under this section and States providing information and assistance as provided by subsection i. of this section may request and receive the assistance of Federal agencies, including national laboratories. The Federal agencies are authorized to provide such assistance, which may include manpower training, the loan of personnel, and such studies and data as may be required by the State to discharge its responsibilities under the approved program or under subsection i. of this section.

"i. Any State that does not have a program approved by the Commission under subsection e. may provide to the Commission such information and assistance with respect to the evaluations or determinations provided for by this section as the State may deem appropriate. Such information and assistance may include any decisions regarding the need for and any data, analyses, conclusions, findings and/or decisions regarding any or all environmental impacts (except radiological safety impacts of the operation of the facility) of the proposed thermal neutron power generation facilities. The Commission may rely on such data, analyses, and conclusions in discharging its responsibilities under the

National Environmental Policy Act of 1969, as amended. Paragraph (5) of subsection a. shall not apply to such information and assistance.

"j. The Commission is authorized to make annual grants to any State or authorized interstate or regional agency for the purpose of assisting in the development or administration of a program specified in this section or the providing of information and assistance as provided by subsection i. of this section. Such grants shall be allocated among States and authorized interstate or regional organizations based on rules and regulations promulgated by the Commission. A State or authorized interstate or regional organization may, subject to the criteria contained in section 197 and the rules and regulations of the Commission issued pursuant thereto, use that portion of the money received under this subsection as may be permitted by the Commission to fund intervenors in proceedings held in furtherance of such State or interstate or regional organization's responsibilities under this section or under section 185 a. or b. . There are authorized to be appropriated for this purpose such sums as may be necessary for the fiscal year ending September 30, 1979.

"k. Except as expressly provided by this section, the responsibility of the Commission or any other Federal agency to comply fully with the requirements of the National Environmental Policy Act of 1969, as amended, shall not be changed."

FEDERAL AND STATE COORDINATION .

Section 203.

The Atomic Energy Act of 1954, as amended, is amended by adding a new section 196 to read as follows:

Section 196.

Federal and State Coordination--

"a. With respect to any application for a site permit, for approval of a standardized facility design, for a construction permit and/or operating license, or for a manufacturing license, the Commission shall establish a schedule for the conduct and completion of all required Commission reviews and decisions. The Commission is authorized to cooperate with other Federal, State or regional agencies with review and/or decisionmaking authority regarding the siting, licensing, construction, or operation of nuclear power reactor facilities in order to eliminate duplication of effort, establish a common data base for similar reviews and decisions, and assure timely decisions. The Commission shall establish, after consultation with the interested Federal and State or regional agencies, target dates consistent with the Commission schedule for completion of agency reviews and decisions. All Commission cooperative efforts, including establishment of schedules and target dates, shall be accomplished in a manner consistent with the statutory obligations of all Federal and State or regional agencies, and the Commission shall have no authority to require any agency to reach a particular decision on the merits of any matter pending before it. Neither the establishment of a schedule or target date by the Commission nor the failure of any affected Federal, State or regional agency to meet a target date shall be subject to judicial review, whether in a proceeding to review or set aside an individual affected Federal, State or regional agency decision, or otherwise.

"b. The Commission or a State that is making all the determinations provided for by section 195 shall be the lead agency for purposes of the preparation of any environmental impact statement required by section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, for any action taken under this Act.".

TITLE III—INTERVENORS

FUNDING FOR INTERVENORS

Section 301.

The Atomic Energy Act of 1954, as amended, is amended by adding a new section 197 to read as follows:

Section 197.

Funding for Intervenors—

"a.

"(1) The Commission is hereby authorized to establish a pilot program for funding intervenors in initial or renewal licensing proceedings, including site permit, construction permit and/or operating license and amendment proceedings, but not including any proceeding for an export license, conducted by the Commission pursuant to the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, as amended. The Commission may, in its sole discretion, also extend the pilot program to selected rule-making proceedings conducted by it.

"(2) This section does not authorize the payment of funds for merely attending, as opposed to participating as a party in, Commission proceedings, nor for proceedings where the cost of participation is minimal.

"(3) This section does not create any new right to participate in any Commission proceeding which is not authorized by other provisions of law.

"b. The Commission shall, upon request and subject to available appropriations, the eligibility criteria set forth below, and any allocation determination under this subsection, pay for all or part of the cost of intervention of a party, including attorneys' fees, in Commission proceedings of the type described in subsection a. The amount paid, if any, need not cover all the costs of intervention and shall be determined based upon the intervenor's contribution to the proceeding, the provisions of this subsection and subsections f. and g., and procedures and criteria established by the Commission by rule or regulation for determining the eligibility of intervenors for funding and the amount of funds to be provided. These criteria shall include requirements to establish the following:

"(1) the intervenor's interest in the matter;

"(2) that the intervenor does not have reasonable access to alternative sources of funds;

"(3) that the intervention would not occur or its effectiveness would be significantly limited in the absence of funding;

"(4) that the intervenor's participation is likely to lead to presentation of substantive arguments and/or views that would not otherwise have been presented; and

"(5) that presentation of such views can reasonably be expected to contribute substantially to a fair determination in the proceeding.

The Commission shall by rule, regulation or order, allocate available funds for costs of intervention to types or classes of proceedings.

"c. Payments shall be made following the proceeding unless the intervenor establishes to the satisfaction of the Commission that advance payments are required in order that its participation not be substantially impaired.

"d. A person who receives payments after a final decision or order pursuant to this section or advance payments pursuant to this section shall be liable for repayment of part or all of such payments actually received, or for forfeiture of part or all of such payments for which such person is otherwise determined to be eligible, whenever the Commission determines that:

"(1) the person clearly has not provided the representation for which the payments were made or authorized; or

"(2) the person has acted toward any other participant or the Commission in such a way as to unjustifiably delay, mislead, or otherwise frustrate the objectives of the proceeding.

"e. The amount of costs of intervention awarded under this section for a particular proceeding shall be based upon the appropriations available and the prevailing market rates for the kind and quality of the services furnished, except that not expert, consultant or attorney shall be compensated at a rate in excess of the highest rate of compensation for experts, attorneys and consultants paid by the Commission.

"f. Whenever applications for payment under this section are submitted by more than one intervenor, the Commission may require consolidation of duplicative presentations, select one or more effective representatives to participate, offer compensation only for certain categories of expenses, or jointly compensate parties representing identical or closely related viewpoints.

"g. Any decision of the Commission made pursuant to this section shall be subject to review in court to the same extent as any other Commission decision, notwithstanding the fact that such decision may be interlocutory in nature, except that the courts of the United States shall have no jurisdiction to stay, restrain or otherwise enjoin the proceedings of the Commission based on an alleged violation of this section, nor shall the courts of the United States have jurisdiction to reverse, remand or otherwise require reconsideration of any other Commission decision solely on the basis of a Commission decision under this section, except where there has been a clear abuse of Commission discretion.

"h. The Commission shall, within ninety days after the date of enactment of this section, propose regulations to carry out the provisions of this section. Such regulations shall be adopted by the Commission and take effect no later than one hundred eighty days after the date of enactment of this section.

"i. Authority to fund intervenors under this section shall expire on December 31, 1983, except that the Commission may continue to fund intervenors in proceedings which were underway on that date and where applications for funding in such proceedings were already filed with the Commission before that date. On or before December 31, 1982, the Commission shall prepare and transmit to the Congress a report on the impact and effectiveness of this section.

"j. There are hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this section.".

D. Legal Doctrines of Federalism Pertinent to the Solution of the Interstate Coordination Problem:

(1). The supremacy clause and federal preemption:

So called "federal preemption" doctrine begins with the Supremacy Clause of the constitution and ends with judicial efforts to fathom the intent of Congress. The second clause of Article VI reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

From this clause it is clear that when a federal law* and a state law are mutually exclusive--the obedience of one is the violation of the other--the federal law prevails and the state law must be disregarded. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) is an early example of this. Congressional intent is unimportant in such a case although Congress conceivably could expressly say, "This law shall not supersede any contrary state law," which would not mean that Congress had pro tanto overridden the Supremacy Clause but rather would mean it had written an exception into the federal law.

But real preemption doctrine does not come into play unless the conflict between federal and state law is less than that of mutual exclusiveness. In general there are two kinds of such lesser conflicts: (1) the fill-in-the-gaps type, (called "occupying the field") in which there is a gap or silence in the federal regulation filled in by state law (e.g., federal law regulates width and weight but not height of trucks) or (2) the higher standard type, in which the state law sets a higher standard than federal law (e.g., for smokestack emissions). In either case it is possible to obey both federal and state law but, nonetheless the state law may "conflict" with the federal law because (1) Congress may have intended the gap to be an unregulated area, an area of free private choice (e.g., truck height shall be determined by the trucker), which is to say that Congress intended to occupy the field and oust the state of legislative jurisdiction--the law regulating a particular subject will either be federal law or no law; or (2) Congress may have intended the standard set not as a minimum standard but as the only standard (e.g., air cleanup to 5 parts per million of some particulate emission is all that must be met) thus a higher state standard (say 3 parts per million)

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*"Federal law" must be made pursuant to the constitution, of course, which means it must have been made pursuant to some power specifically enumerated (mostly in Art. I, § 8) in the constitution or that is "necessary and proper [i.e., appropriate] for carrying into Execution" the enumerated powers.

"conflicts" with the federal policy implicit in its standard.

On the other hand Congress may have intended that the "gaps" should be filled at the discretion of the states, which is to say that Congress did not intend to occupy the field of this legislative subject; or it may have intended the Congressional standard to be merely a national minimum to be exceeded by the states if they choose to give even greater protection to the health, safety or comfort of its own citizens, which is to say that the state higher standard "supplements" or "compliments" the federal standard and does not "conflict" with it.

It would seem that Congress could obviate the uncertainty by express language addressing the issue of preemption saying, for instance, that this law is not intended to supersede state laws on the same subject or that subjects not covered such as the height of trucks can be regulated by state law or that the emission standards set are minimums only. In practice however Congress often does not eliminate the uncertainty with language precise enough to do the job. Two reasons for this seeming imprecision come to mind. The exact lines as to how much state law should be displaced by an act or how much state law supplementation to permit is inherently difficult. Moreover the impact on state legislation of most proposed federal acts is but a secondary issue to the substantive merits of the proposal. Since successful promotion of legislative proposal requires the avoidance of issues on secondary matters (one can only lose votes on such issues) and since precise drafting of lines would, as stated, be difficult at best and raise serious issues, it follows that an act's promoters will often gloss over the preemption issue with either a very general statement of attitude toward state law in the area or no statement at all.

For example, the Security Exchange Commission Act of 1934 (15 U.S.C. § 78bb(a)) says, "Nothing in this chapter shall effect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter . . . ." (Emphasis added.) Legislative history made clear that this provision in the original act was intended to save state security regulating laws (Blue Sky Laws). But when the act was amended in the 1960's to regulate tender offers (the Williams Act) the quoted clause was little help in determining whether or not state tender-offer legislation would be superseded. See Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competency, 62 Corn. L. Rev. 213, 246-54 (1977). The word "conflict" can mean either mutual exclusiveness or merely that the policies of the federal and state laws are incompatible. Perhaps the federally imposed requirements for making a tender-offer reflect a careful balance between allowing corporate takeovers by tender-offers (stock liquidity and price is helped and sometimes faltering companies are bolstered by new management) and adequate education of stockholders so that they might make an informed judgment as to whether or not to accept the offer tendered for their stock. If a state setting of higher standards for disclosure so burdens or delays tender-offers that it effectively eliminates such offers, then the federal balancing of interest (i.e., the federal policy) will be defeated, and it can safely be said that the state law "conflicts" with federal law. Unfortunately the underlying policy of the Williams Act (like most legislation) does not leap from the act. Whether or not Congress intended the disclosure procedures as a careful balancing of interests or as an educational minimum (to be supplemented by further state requirements) must be fathomed through legislative history, the overall language of the act and the place of the act in our constitutional scheme.

This brings us to preemption doctrine as a particular specie of legislative interpretation. Where a court is guided by express language, say, that the federal standard is a minimum only (federal Environmental legislation is replete with such provision and others relating to federal-state conflict) then it's a simple (?) matter of interpreting those expressions. But where a court is guided only by general expressions such as "does not conflict," or by no expression at all, the Court has used factors based on notions of the federalistic scheme established by the constitution to inform its judgment of legislative intent. The analysis the Court makes when the issue is of the first type--Did Congress intend to occupy the entire field of the legislative subject and thus preclude any state regulation in the "field?"--is (a) the pervasiveness of the federal legislation, (b) the federalistic nature of the general subject of regulation, (c) the potential for conflict with federal law. Let us look at each of these items briefly.

Pervasiveness Factor

Of the inference as to intent that can be drawn from the relative pervasiveness of the federal legislative scheme the Court has stated that the issue is whether the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947); quoted in Pennsylvania v. Nelson, 350 U.S. 497 (1956). In the latter case the Court in concluding that federal anti-communist legislation had superseded the state Sedition Act stated: "Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it." In City of Burbank v. Lockheed Air Terminals Inc., 411 U.S. 624 (1973) the court stated: "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption (of a Burbank ordinance prohibiting 'pure jet' takeoffs or landings at the Burbank airport from 11 p.m. to 7 a.m.)."

Nature Of The Field Factor

The federalistic nature of the general subject of regulation is really a constitutional factor and fits less comfortably into the language of divining legislative intent. But it should be remembered that "legislative intent" is a legal concept partly built on guessing what the collective legislative will actually was (would have been had they thought of this particular issue) and partly on judicial perceptions of what the legal system demands in terms of predictability and interlegislative relationships, i.e., in terms of sound government. It is reasonable to put the "demands of the legal system" under the general rubric of "legislative intent" because this rightly implies that the legislature (here Congress) can change the future impact of the judicial interpretation of their preemptive intent even where such "intent" was inferred from the systems' demands and not from divining the collective mind of Congress. Congress can simply pass a law saying we do or do not intend such and such preemption.

Of this factor based on the constitutional scheme the Court has said that federal statutes touching on foreign affairs and national security from external or internal subversion "touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of the state laws on the same subject." Pennsylvania v. Nelson, supra. "Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax." Hines v. Davidowitz, 312 U.S. 52 (1941).

In the Air Terminal Ordinance Case (City of Burbank v. Lockheed Air Terminals Inc., supra) Justice Rehnquist for the four dissenters described the Courts' usual attitude toward commerce clause preemption.

> ". . . control of noise, sufficiently loud to be classified as a public nuisance at common law, would be a type of regulation well within the traditional scope of the police power possessed by States and local governing bodies. Because noise regulation has traditionally been an area of local, not national, concern, in determining whether congressional legislation has, by implication, foreclosed remedial local enactments 'we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' . . . This assumption derives from our basic constitutional division of legislative competence between the States and Congress; from 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy . . . .' San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243, 79 S.Ct. 773, 779, 3 L. Ed.2d 775 (1959) (emphasis added). Unless the requisite preemptive intent is abundantly clear, we should hesitate to invalidate state and local legislation for the added reason that 'the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.'" (Emphasis in the original.)

Moreover in Maurer v. Hamilton, 309 U.S. 598 (1940), the Court said, "As a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power (Art. I, § 8 (cl. 3)) is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially true when public safety and health are concerned." But where the character of the interstate commercial activity being regulated requires uniform national (or at least regional interstate) regulation, and the state law will necessarily have an interstate impact (i.e., the state law will have an extraterritorial effect) then the Court will be inclined in favor of preemption. This was true in the Air Terminal Ordinance Case, and in Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972). There the court struck down state nuclear radiation safety standards that were stricter than those promulgated by the

AEC. The court emphasized that the nuclear facility in question, although located in and affecting the safety of the regulating states, provided energy for a three state region and formed part of a national power grid. Thus the state regulation had an extraterritorial impact, in effect, one state was legislating for another, which violates notions of political competency. Better the AEC, responsible to a national constituency, should regulate alone. The Supreme Court in First Iowa Hydro-Electric Cooperative v. Federal Power Comm., 328 U.S. 152 (1946) refused to allow Iowa to require a permit for the construction of a dam on a navigable river. The Court said, "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as all others." (Id. at 182.)

Actually in analyzing the nature of the field three distinct but interrelated factors must be examined: (1) localness (in terms of constitutional assignment) of subject, (2) need for uniformity, and (3) extraterritorial impact of the local regulation. Any expressions of Congress as to these factors will be very persuasive to the court. For example in Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) the Court upholding a Detroit anti-pollution air standard that required structural changes in the boilers of federally licensed steamships operating interstate on the Great Lakes, relied heavily on a Congressional statement in 1955 (69 Stat. 322) that "it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution . . . ." Thus despite the extraterritorial impact of the Detroit ordinance (the rebuilt boilers go everywhere) and the potential friction with other state anti-pollution laws (but not actual friction as the Court emphasized) which generally shows the need for uniform regulation, the Court upheld the ordinance.

Potential For Conflict Factor

The final consideration is potential for conflict with federal law. There are two kinds of potential conflict, between state and federal laws: procedural and substantive. Many laws set up administrative schemes for their enforcement often including agencies with ongoing rule-making and adjudicative functions. These procedures for enforcement of general Congressional policy are usually part and parcel of the law. The agency's expertise is relied on by Congress to flesh out skeletal policy and to apply it to particular cases. Such laws are dynamic not static. It is, in a sense, difficult to know where the interstices are. Moreover the procedures themselves are confusing to those being regulated. In Pennsylvania v. Nelson, supra the Court said:

> "Third, enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. Since 1939, in order to avoid hampering of uniform enforcement of its program by sporadic local prosecution,

> the Federal Government has urged local authorities not to intervene in such matters, but to turn over to the federal authorities immediately and unevaluated all information concerning subversive activities . . . ." When we were confronted with a like situation in the field of labor-management relations, Mr. Justice Jackson wrote: 'A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.' Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned by Mr. Justice Jackson, but the added conflict engendered by different criteria of substantive offenses . . . ."

When type one or "Occupy the field" analysis reaches the potential for substantive conflict, it merges with analysis of the second type of "conflict"--does state law compliment federal law or conflict with it?--except that type one is concerned with "potential" conflict and type two with "actual" conflict.

Of the substantive conflict the Supreme Court has said: "our primary function is to determine whether under the circumstances of this particular case, (the state's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52 (1941). In Jones v. Rath Packing Co., 97 S.Ct. 1305 (1977) the Court applied this standard and concluded that a California regulation that made no allowance in flour packaging for loss of weight resulting from moisture loss during the course of good distribution practices "conflicted" with federal law in this "full purposes" sense. It prevented the achievement of the full purposes of a federal Fair Packaging and Labeling Act which does make such allowance for weight loss even though both federal and state standards could be met simply by putting in a little more flour when it was packaged. Thus if the flour might go to California, the packer must overpack. Local distributors, say in Arizona, following the federal standard would not overpack. Thus a one pound package of flour in Arizona would contain less flour if from a local distributor than from a national or regional distributor. This would tend to defeat the purpose of the federal act which was to facilitate comparison shopping. In this instance national uniformity was necessary in order to achieve the Congressional purpose of the FPLA.

Often the conflict is one in which the federal "minimum" standard is not a mere minimum but is the optimum standard resulting from a Congressional compromising of conflicting interests as was illustrated above with the discussion of the state tender-offer laws. Obviously a state law setting a higher standard would upset this balance and thus conflict with the Congressional purpose.

Two main things must be remembered from all this: (1) Congress can control the fact and extent of preemption if it so chooses and (2) "prior cases of preemption are not precise guidelines . . . for each case turns on the peculiarities and special features of the federal regulatory scheme in question . . ." (City of Burbank v. Lockheed Air Terminal Inc., supra at p. 1862) and all three of the above outlined factors must be considered in any case plus the usual analysis of statutory language and legislative history.

One other cognate subject should be mentioned. Congress can expand state power to control interstate commerce (i.e., to pass laws having substantial effect on commerce) beyond what would otherwise be constitutionally permissible (i.e., it would otherwise be labeled an "undue burden" on interstate commerce or "discrimination" against interstate commerce). The Court in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) said: "Whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the Commerce Clause, this body has accommodated its previous judgment to Congress' expressed approval . . . ." "[I]n all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of (Congressional) power. Much less has this boundary been thought to confine what Congress and the states acting together may accomplish." See also *In re Rahrer*, 140 U.S. 545 (1891); *Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311 (1917); *Parker v. Brown*, 317 U.S. 341 (1943); *Huron Portland Cement Co. v. City of Detroit*, *supra*.

For excellent discussions of preemption see Tribe, *American Constitutional Law*, pp. 376-90, (1978); Hirsch, *Toward a New View of Federal Preemption*, 1972 U. of Ill. L. Forum 515.

(2). The eleventh amendment and sovereign immunity:

Sovereign immunity is a common law doctrine that the state is immune from lawsuit. The Eleventh Amendment has to an extent constitutionalized this doctrine by immunizing states from private citizen's lawsuits in the federal courts. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State . . . ." "While the Amendment by its terms does not bar suits against a State by its own citizens, the Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Edelman v. Jordan*, 415 U.S. 651 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890).

Two doctrines have been developed to avoid the seeming absoluteness of this ban on citizen vs. state suits in federal court:

(a) State officials who are enforcing a state law that a citizen alleges is unconstitutional are for jurisdictional purposes presumed to be doing as alleged (i.e., enforcing an unconstitutional law) and since an unconstitutional law is a void law (i.e., no law) the official is merely acting under *color* of state law and a suit to enjoin such enforcement is not against the state but against the official and therefore not a violation of the Eleventh Amendment. The official's action under color of state law is nonetheless "state action" for purposes of a violation of the Fourteenth Amendment. *Ex parte Young*, 209 U.S. 123 (1908). Furthermore, "[i]t is well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment . . . 'when the action is in essence one for recovery of money from the state . . . .' Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Edelman v. Jordan, supra. Recently in Quern v. Jordan, 440 U.S. 332, 337 (1979) the Court put this doctrine in succinct form:

> "The distinction between that relief permissible under the doctrine of Ex parte Young and that found barred in Edelman was the difference between prospective relief on one hand (permitted) and retrospective relief on the other (forbidden)." (Emphasis added.)

(b) the second doctrine avoiding the absoluteness of the Eleventh Amendment ban is that a state can "waive" this immunity.

A state's immunity can be waived either by deliberate action of the state or "constructively," i.e., by the Courts declaring it so. For instance, if a state does such and such thing that is subject to federal control (such as operating an interstate railroad) and part of the federal control is the authorization of private suits in federal courts (such as against railroads for personal injuries) then the state is construed to have waived its immunity merely by the act of operating a railroad. Nor could the state expressly deny its waiver. The act of operating the railroad is waiver. Parden v. Terminal Railway, 377 U.S. 184 (1964).

In Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), the Court assumed "arguendo that this suit must be considered as one against the states since this bi-state corporation is a joint or common agency of Tennessee and Missouri." (Id. at 279.) The Court interpreted a clause in the Compact giving the Compact agency the power "to contract, to sue and be sued in its name." The Court stated that "when the . . . basis of waiver . . . is a statute, the question . . . is whether the State has intended to waive its immunity. But where the waiver is, as here, claimed to arise from a compact between several States, the Court is called on to interpret not unilateral state action but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with Congressional approval, is a question of federal law." (Id. at 279.) "Congress might of course adopt as federal law the law of either or both of the States . . . . But Congress took no such step here. It approved a sue and be sued clause in a compact under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have." (Id. at 280.) Justice Frankfurter, with two other Justices, dissented from this assertion and from the finding of jurisdiction. (Id. at 283.)

However, the Court has retreated from the broader implications of the Petty and Parden cases. In Edelman v. Jordan, 415 U.S. 651 (1974) the Court concluded that the mere fact of participation by the state in a federal program did not itself signify consent on the part of the State to be sued in the federal court. Congress must make clear its intent to require waiver of the state's immunity to suit in federal court. Such constructive waiver of the Eleventh Amendment right will not be lightly inferred. But if Congress does clearly express a requirement of waiver in connection with a state's undertaking a regulatory program that Congress could constitutionally undertake itself, then the state will be held to have waived its immunity by the fact of the undertaking regardless of what it really intends.

A third doctrine mitigating the strictness of the jurisdictional ban is that local governmental units, although exercising state sovereign authority, are not immunized from federal court suit by the Eleventh Amendment. In Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979) the Court said:

> "If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment." (Emphasis added.)

The Court found TRPA to be an unimmunized political subdivision, a sort of interstate-local governing body. In finding TRPA to be a local governmental body the Court sited Compact language, California and Nevada's disclaimer of intent to confer immunity, the fact that six of the 10 members of TRPA are appointed by counties and cities and that funding comes from local government.

Finally, the Court has recently ruled that nothing in "Art. III, authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the power of California [to allow one of its citizens to sue the State of Nevada in California state court for the tort, on a California highway, of a Nevada state employee]." Nevada v. Hall, 440 U.S. 410, 421 (1979). Nor does the Full Faith and Credit Clause or any other federal law protect Nevada from a citizen's suit in another state's courts. (Id. at 421-22.)

In sum, Congress can control the suability of states by private parties in federal court, whether in connection with a federal act or an interstate compact. See Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682 (1976).

(3). The tenth amendment and intergovernmental immunities:

Intergovernmental immunity was a once broad doctrine that immunized federal governmental agencies from state control and taxation and vice versa. The doctrine had shrunk to insignificance until its recent revitalization in National League of Cities v. Usery, 426 U.S. 833 (1976). An excellent brief discussion is contained in a note entitled Municipal Bankruptcy, The Tenth Amendment and the New Federalism, 89 Harv. L. Rev. 1871 (1976). It should be remembered that in National League of Cities v. Usery Justice Rehnquist was writing for only four members of a nine member court. The fifth and narrow majority vote was supplied by Justice Blackmun, who, although nominally joining in Rehnquist's opinion, wrote a brief concurrence which suggests an entirely different emphasis, that of striking a balance between the federal interest in national legislation and the state's interest in autonomy. Rehnquist's emphasis was entirely on whether or not the federal law encroaches on "functions essential to separate and independent [state] existence." Blackmun said he understood the majority opinion as adopting "a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater." (Emphasis added.)

At this point I judge National League of Cities v. Usery not to be a major stumbling block to federally mandated interstate coordination of power plant siting, either through direct federal control of the industry (the doctrine is irrelevant here) or interstate compacts (equally irrelevant) or federally controlled or facilitated state coordination with other states of power plant siting, planning and licensing with this caveat: Congress cannot mandate that state officials legislate in some fashion, where that mandate is to be enforced by federal court injunction or other Draconian sanction. (See "Sanctions" in the Glossary of Terms.) But Congress can "induce" such coordination by offering the states the opportunity to voluntarily join in regional coordination agreements either by compact or by participation in a federal program. If by compact, a compact agency would facilitate coordination. If by a federal program, a federal agency (with or without state appointing authority) would facilitate coordination. The alternative to such "voluntary" participation would be federal takeover of a state's power plant siting decision-making authority which under the commerce clause no one doubts the federal government has the power to do (unless four more Rehnquists are appointed to the Supreme Court). See Stewart Machine Co. v. Davis, 301 U.S. 548 (1937) discussed in the Glossary of Terms under "Sanctions."

E. Potential Federal Solutions to the Problem of Efficient Interstate Coordination:

(1). General advantages and disadvantages of a federal solution:

The major advantage of a federal solution to the problem of interstate coordination of power plant development is that it combines the legal power to coordinate with the political arrangement that makes for responsible and responsive coordination. Congress is organized to represent both the nation as a polity (the people as U.S. citizens) and the states as polities (the people as state citizens). Moreover, the public is accustomed to federal control. Regular channels of communication with Congress are available. Furthermore, interstate regional coordination is only part of a need for national coordination, which Congress can provide for. On the other hand, the coordination between (say) two or more interstate regional compacts might be difficult to effect.

Other considerations point away from federal control. The centrifugal nature of our democratic attitudes (it is this centrifugal force that causes Congress to have states implement federal policy) when coupled with the basically multi-state regional but not national nature of the decision-making needs in the area of electric power plant siting point to purely regional (not national) arrangement but with full federal participation. Moreover, while Congress may be accessible it is less accessible than state or local legislatures. Furthermore, the federal bureaucracy will be relied on for implementation of federal coordination, not Congress, and the bureaucracy is not viewed as accessible. The federal bureaucracy is very large and is itself in constant need of coordination. Witness: The Ohio River Valley Tri-Regional Compact--the "Regions" whose activities are to be coordinated are merely administrative regions created to facilitate regulation.

There is one final factor that may militate a federal as opposed to state or regional solution. Some states in a natural coordination region may have a much greater interest and thus impetus to cooperate with sister states than do other states. The interstate environmental impacts are not reciprocal. Air moves roughly from west to east. Pennsylvania gets Ohio's bad air but not vice versa. True, Ohio gets Pennsylvania's bad water, but, it is the nature of things that potential trade-offs are not equivalent between air and water. All Ohio has to gain in voluntarily agreeing to coordinate air pollution control with Pennsylvania is the warding off of the federal control which may come if they do not agree. That may not be enough.

(2). Discussion of possible federal legal arrangements to effect coordination:

A short solution would be to amend the Clean Air Act to specifically provide that the State Implementation Plans take into account the long range transport of air pollution from the state sources and that the state enforcement agency will regularly notify other states of the potential out of state impacts. A partial, seemingly simple, solution, at least to the long range transport of air pollution problem, would be to amend the Clean Air Act to provide that State Implementation Plans consider all the long range impacts of stationary sources. Only where a stationary (existing or proposed) source causes or will cause another state to be immediately prevented from attainment or maintenance of national primary or secondary ambient air quality standards (or interfere with another state's Prevention of Significant Deterioration (PSD) program) must a state consider extrastate impacts under existing law (Clean Air Act §§ 110(a)(2)(E)(i), 126, and 160). However, it may be quite difficult to set standards other than those implicit in the existing law (see Tri-Regional Memorandum of Understanding, especially II, (6)e) by which one state considers even small (but potentially incremental) effects on another. Moreover, having one state unilaterally judge the impact on a second state where the judgment may be crucial to its own development would tax the ability to be objective of even the most dedicated state official and probably not be satisfactory to the impacted second state. To be effective EPA monitoring would be tantamount to a takeover of the implementation. Therefore, regional planning seems necessary.

One way to effect such planning would be to establish a federal non-prescriptive planning agency as a resource to facilitate interstate coordination, either:

(a) through development of long term power development plans based on comprehensive regional studies by giving additional authority to an existing agency such as the Ohio River Basin Commission (see discussion of ORBC above) but with only promotional means available to achieve voluntary state coordination by using the plan; or

(b) the same as (a) except the long range plan could either be accepted or rejected by a state. Acceptance would entail reciprocal rights and duties vis-a-vis other accepting states to be enforced either by an action in the Supreme Court under its original jurisdiction or by a special court created by Congress (see Section 7 on this report) to hear and resolve such disputes with perhaps a limited review by the Supreme Court (which may be constitutionally unavoidable). Rejection by a state would mean it could not sue or be sued by other states to enforce the plan, but, of course, its electric utilities would still be subject to the ordinary federal energy and environmental regulations including citizen's suits in federal courts and suits by other states under federal common law in the Supreme Court; or

(c) the same as (b) except that the agency would be based on the development (or catalyst) model of the Appalachian Regional Council with federal funds available to defray governmental and industrial costs of states accepting the plan or the acceptance of the plan could entail the right to participate in federally funded development programs related to implementation of the plan. Acceptance or rejection by a state would otherwise entail the same rights and duties as (b).

Another option would be to create federal regional planning agencies as above including the various options but with any particular regional plan requiring the approval of Congress, either:

(a) by special act of Congress, or

(b) by submission to Congress for a set veto or modification period after which, if Congress does nothing, it becomes the regional plan to be accepted or rejected by states under the various options set out above. The model for this is the Federal Rules Enabling Act of 1934 (48 Stat. 1064) 28 U.S.C. § 2072 by which the Supreme Court was authorized to promulgate the federal rules of civil procedure. The act said "[The rules] shall take effect six months after their promulgation." The court was also authorized to unite law and equity

> rules and "[s]uch united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." The rules have been amended by the same process. The Federal Rules of Evidence were promulgated the same way but Congress exercised its veto power and suspended the effective date of the rules and required that they be modified before it allowed them to become effective.

Still another and stronger option would be to establish a regional planning agency as above but on its plan's acceptance by Congress (either actively as in (a) above or passively as in (b) above) then it immediately goes into effect imposing rights and duties on the state's vis-a-vis each other to be enforced by special court or the Supreme Court. (Again see Section 7 of this report.)

A variation on the above planning models would be to structure the federal agency to include state representation like ORBC but, unlike ORBC, would act by majority vote (ORBC acts by consensus).

A further variation would be to give the federal planning agency power to invoke the plan (given its approval by each affected state or by Congress or both) by authorizing it to bring action in a federal regular or special court to upset or modify a particular state power siting decision. This, of course, assumes, as do all the above options, primary state licensing authority.

A final variation would be the same as that immediately above except, and this is a big exception, that the planning agency would, on approval of its plan (by one of the above mentioned methods), become the primary licensing authority of any new power plant or significant new power development. This would make for a stronger invocation process. Instead of invoking the plan in a negative way as in the previous optional variation by vetoing (or challenging) state granted licenses that do not conform to the plan, the invocation by primary federal licensing would guarantee that any new electrical power development would conform to the plan as to size, location, emissions, etc. Of course, an existing federal agency such as the Federal Energy Regulatory Commission could be used for such licensing.

Any federal planning agency that might be established would look to the entire impact--environmental, economic and energy resource and utilization--of any electrical power development.

Without any such planning as suggested above, but by using existing or strengthened federal law, a special federal court might be used as outlined in the "special or ad hoc courts" portion of Section 7 of this report.

Another line of federal options would be to establish a federal agency whose sole function is to coordinate state siting decisions. A new agency (with nationwide authority) could be established or an existing agency could be expanded. A new agency could have experts appointed solely to serve on the agency or it could be composed of selected representatives of various existing agencies such as EPA, the Energy Department, the Justice Department, the Corps of Engineers, etc., with or without, but advisably with, a special administrative staff. Legislation creating such an agency could make it the sole federal agency for review of state siting decisions. It could require that all state siting (or other significant power development) decisions be preceded by an interstate impact statement (IIS). To expedite review, the IIS would be subject to a strict timetable including any input (which should be allowed) from sister states. Careful formulation should be made of the exact contents such an IIS must have. Federal agency help (and prior training) in completing the IIS should be provided.

Such an IIS would then be reviewed and assessed by the interstate coordinating agency. Its assessment could be purely recommendatory or the agency could be authorized to seek to enjoin those state siting decisions made against its recommendations or against its recommended modifications or that are based on an inadequate IIS.

Of course, the final federal solution would be to make FERC the site licensing authority, entirely depriving the states of such authority.

CHAPTER II: STATE LAW

Section 3: State Siting Law, Background to the Need for Interstate Coordination.

Introduction And Overview

There are three recent studies of state power siting law, two of which focus on the ORBES region: White and Fitzgerald, Legal Analysis of Institutional Accountability for the Ohio River Basin (1977), a report commissioned by ORBES: A report entitled Regional Facility Siting in the ORSANCO States, written by a "Facilities Siting Task Force" of ORSANCO, Eugene Mooney, Chairman, of ORSANCO (the acronym for the Ohio River Valley Water Sanitation Compact Commission); and three chapters VII, VIII and IX contained in Volume II of Energy and the Law, Problems and Challenges of the Late '70's, an American Law Institute and American Bar Association course of study materials (1977). The three chapters are VII, D. Fellman, Comparative Analysis of Power Siting in the United States, p. 345; VIII, J. Haggard, State Power Siting Laws, p. 367; IX, R. Feldman, State Power Plant Siting, Issues, Approaches, and Current Legislation, p. 421.

In addition to these three studies there was a report in the Bureau of National Affairs Environment Report, June, 1973, by Berlin, Gill and Yarrington, Power Plant Siting--An Overview of Legislation and Litigation (Monograph No. 15) and there are a number of other studies cited in the above cited reports.

Each of the cited studies for the most part discuss the structure and process of state siting law but not how it works in fact. An article by Philip F. Cronin, Jr. and Scott M. Turner, Article VIII of the Public Service Law--The Brave New World of Power Plant Siting in New York: A Critique and Suggestion for an Alternative Approach, 42 Albany L. Rev. 537 (1978) takes a critical look at the New York law in practice. Cronin and Turner have acted "as counsel to a public utility in numerous power plant licensing and environmental matters" and their views "generally reflect public utility views of the licensing process discussed herein." (Id. at 537, first footnote.) This section briefly canvasses their views below. Otherwise this section is a brief survey of siting practices in ORBES and other states, not a critical evaluation of how they work in fact. This survey is intended merely as a background to the interstate focus of this report.

At the outset it should be noted that the basic premise underlying state siting is that siting of power plants is a land use problem and land use is a state not a federal law concern. Moreover within a state, land use has traditionally been a local government not a central state government concern. State governments typically transfer or delegate their sovereign authority to regulate land within their territory to county or municipal or regional local governmental units. State law, in general, merely authorizes local governmental units to create and implement zoning codes, land use planning schemes and subdivision regulations. Thus a statewide siting authority is itself a departure of recent vintage from traditional local control.

Two factors have militated this change. Public utilities have traditionally been regulated as to rates and service areas by state, not local, administrative agencies (Public Utility Commissions or Public Service Commissions). Thus some central administrative authority over electric utilities was already in place. With the advent of comprehensive federal environmental and energy regulations, implemented by state government through some state agency or agencies, both the need for, and means of, statewide control of utility siting became evident. Electrical utility generating facilities have the potential, of course, for impacting the environment, energy resources, and economy (and thus, if you will, of "impacting" federal policy relating thereto) to a degree and over an area far beyond the local site. This potential impacting effect has been dramatized by the building of huge generating facilities with the use of recent technology.

The recentness of this change from local to statewide control of power siting is underlined for two reasons. First, the change has been tentative, incomplete, greatly varied from state to state, and even, at times chaotic. Most of the scholarly studies and reports have focused on the progress of this change from local to state control and on how it can be furthered and improved. Second, and of greater importance to this report, the change of legal institutions in a political democracy must be accompanied by a concomitant change in public attitude. It is probably safe to say that public attitudes as to what is acceptable in political and legal institutions change more slowly than do attitudes as to what is acceptable substantive policy. Therefore, although it may seem rational to move now from state to interstate regional control of power siting, it may be unrealistic to expect acceptance of such a further qualitative leap in a context in which the public may just now be accustoming itself to the change from local to state control.

A further concern is this: where institutional attitudes will not change to accommodate changed substantive policy, the public may become frustrated with the substantive policy and its attitude toward that policy may change. In concrete terms if the implementation of environmental protection policies requires accounting for, and controlling, interstate environmental degradation and public institutional conservatism prevents institutional adjustments to accommodate this requirement, then the environmental policies may to that extent lose public support. If other substantive policies seem frustrated by those environmental policies, such as energy resource use and production growth, then environmental policy is doubly troubled. It therefore behooves those concerned with the viability of a strong environmental protection policy to discover and promote palatable interstate arrangements to relieve at least this cause of frustration with environmental policy.

A. Siting Law in the U.S.:

The extensive studies of the current state of power siting law contained in the articles sited in the Introduction to this section show the trend to central state power siting authorities. Over half the states now have some sort of specific power plant siting legislation. Ohio's legislation, detailed in the next part of this section, is typical of the comprehensive state legislation that sets up a special power siting commission. In states that have no specific legislation power plant siting is subject to local land use control law, state environmental agency approval (which may be one or several agencies), and approval of the state utility regulatory authority usually by a "certificate of convenience and necessity."

The earliest of the new specific power siting legislation was 1971. Many states have proposals actively under consideration today. The purpose of this new legislation is twofold: first to make more *efficient* the site licensing process often by creating one central licensing agency (either an existing, or new agency) or by establishing a systematic procedure for going through the various agencies and second, to make more *rational* the siting process by authorizing or mandating statewide planning, by superseding local land use law, and/or by having one statewide, all factors cost/benefit analysis (with or without alternatives analysis)[*] precede any approval.

Each of the new state laws attempts to achieve one or both of these purposes but by a wide variety of methods. Joel E. Haggard, in his article sited above, states (at p. 386):

> "The emerging pattern with respect to state institutional mechanisms for approving bulk energy facility sites generally is either (1) to establish a one-stop agency with power either to determine the question of the site's acceptability or to make a recommendation to another body (1 or 2) . . . to split the authority over site certification between environmental and economic authorities (i.e., between EPA types and PSC types)."

Where there is a new one-stop agency the membership of the agencies varies from state to state both as to number (e.g., Ohio has five voting members; Arizona has 18 members) and manner of choice. But the variety in detail may be deceiving for they all seem to share a common aim of attempting to have people in the decision-making process with expertise in the various areas of impact as well as representatives of the competing interests involved. Moreover, many states have conflict of interest provisions prohibiting the members of the siting agencies from having any ties with the private utilities.

There is much variety in the substantive provisions of state siting law. Local land use laws are sometimes specifically overridden, sometimes deferred to in some way but with ultimate state override authority, and sometimes simply complied with. Long-range planning goes from having public hearings on long-range forecasts and making the forecasts an integral part of planning as with California and New York; to requiring forecasts from the utility regulating agency or the private utilities; to no long-range planning at all. The range of these forecasts is from two to 15 years with 10 years being by far the most common forecast. The Haggard article, *supra*, says this about California's law and long-range planning (at 393-94):

> "California is probably the most ambitious and comprehensive of all the state siting acts on this [planning] point. It provides the new state Energy Resources and Development Commission with authority to set up energy contingency plans, to investigate innovative approaches (such as developing mandatory conservation measures to curtail wasteful

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[*] See footnote supra at 14.

> or inefficient uses of energy) and to sponsor research and development of new energy sources such as solar and geothermal power . . . . The commission is to receive biennially the 5, 10, and 15 year reports forecast from utilities operating within the states. These long-range plans are subject to public scrutiny at open hearings and after analysis and investigation the commission is to issue a report evaluating the long-range plans including assessment of growth trends and measures to reduce these trends."

Maryland has a unique program of "site banking." The Secretary of Natural Resources is authorized to acquire from four to eight sites, which utilities may then acquire (by purchase or long-term lease) from the state when needed.

The process of obtaining data on which to base a decision varies from state to state. Some states rely exclusively on utility supplied data; others on an open hearing where evidence can be given by various interest groups; still other states use their own agencies for independent data gathering; others use private consultants hired by the state, paid for by the utility. Of course, data is needed as to the need for the new facility, the suitability of any proposed site from the utility standpoint (adequate water, transport of fuel, etc.) and the impacts of the new facility, which include environmental, economic and social impacts on a local, intrastate regional, state, interstate regional and national basis.

The impacts that flow directly from the specific location of the site, i.e., its compatibility with surrounding land uses, give rise to alternatives analysis, since arguably, rationality demands, that, other things being equal (i.e., suitability), the available site that is most compatible with its surroundings be picked. As suggested in Section 1, alternatives analysis can lead to much broader inquiry than which of several sites in a given locale is most compatible with its immediate surroundings. It can lead to inquiry concerning conservation versus increased production, nuclear versus coal fueled generation, large plant versus several smaller plants, etc. But for state siting laws, alternatives analysis general means merely which of several potential sites is most compatible or least incompatible with its surroundings. Also as noted in a footnote in Section 1, alternatives analysis, though arguable "more" rationale than straight cost/benefit analysis* of a particular new plant at a particular site, can be very complex and time consuming. For just as no two sites are equally compatible, no two sites are equally suitable.

New York's attempt to guarantee and facilitate alternatives analysis mandated by its siting law was to institute a "two complete cases" approach whereby a utility requesting a site approval has to "submit a complete case with respect to at least two locations suitable for the proposed facility." (16 N.Y.C.R.R. § 70.20(c) (1973).) This requirement is the focal point of the criticism of Cronin and Turner, in the article sited supra, Article VIII of the Public Service Law--The Brave New World of Power Plant Siting in New York: A Critique and Suggestion for an Alternative Approach, 42 Albany L. Rev. 537 (1978). Cronin and Turner claim that the "two complete case" requirement adds "awesome complexity" to the Article VIII process:

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*"Cost/benefit analysis," of course, is used in the NEPA sense of total costs including environmental costs plus ordinary economic costs versus total benefits. "Environmental costs" means the degrading of the environment (air, water, etc.). Relieving these "costs" by use of pollution control technology then transforms those environmental costs so relieved into economic costs. Pre-NEPA cost/benefit analysis was much simpler and less subjective: economic cost versus economic benefit.

> "Requiring comparative consideration of a second site/facility combination under the 'two complete case' approach can only complicate a basic approach already replete with difficult polycentric dimensions.* Important environmental, engineering, technological, economic, social and public policy questions are essentially multiplied since at least two sites and two facilities must be evaluated, compared and balanced to achieve minimum adverse impacts." (at 549)
>
> "More important, however, is the fact that each of the multiple alternatives, as well as the impacts and decision ramifications of each, is held in abeyance until the final Siting Board decision is rendered because there are no mechanisms for eliminating such alternatives as the proceeding progresses." (Id. at 550.)

Moreover the authors add, it upsets the way public utilities have traditionally made siting decisions. "Before Article VIII, a series of important decisions was made by a public utility over a fairly lengthy period of time." "[Now] all these decisions are held in suspension awaiting the outcome of" a "protracted regulatory proceeding . . . ." (Id. at 551.) According to the authors this prolonged administrative process "is inevitably being translated into unacceptably high costs for the applicant and ultimately consumers." (Id. at 551.)

Although these criticisms purport to be leveled at the perhaps unique New York "two complete case" procedure, they could as well be leveled at any thorough-going alternatives analysis used by a siting decision-maker. Another criticism also aimed at the "two complete case" form of alternative analysis, but which hits all such analysis is that:

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* "Polycentric" decision-making was defined by the authors by quoting from Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 Mich. L. Rev. 111, 117 (1972): it is "characterized by a large number of possible results and by the fact that many interests or groups will be affected by any solution adopted; thus, each potential solution will have complex and unique ramifications. In graphic terms, the polycentric controversy can be visualized as a spider web, since '(a) pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole . . . . [E]ach crossing of strands is a distinct center for distributing tension.'"

> "The citizens in alternate site areas are under a unique burden. They must be prepared to intervene and fully participate in the lengthy and complex Article VIII proceedings or lose the opportunity to protect their own interests, which may be adversely affected only if the alternate site is chosen. This is perhaps the least understood and most insidious aspect of the 'two complete case' requirement.
>
> "Despite the extensive public notice given to citizens in the alternate site area, there is an understandable assumption on the part of these citizens that the proposed facility will be constructed at the primary site--in 'someone else's back yard.' The emphasis in the application, public notices and newspaper reports on the 'primary' site and the 'primary' facility, rightly or wrongly, creates a very strong impression that the alternate site will be utilized only if the primary site cannot be approved for some serious reason. In other words, 'why should the Siting Board choose the alternate location if the expert utility company has concluded that the primary site is preferable?' However, under the 'two complete case' approach and 'minimum adverse environmental impact' standard of section 146(2)(c), there is active consideration of the alternative site and the likelihood of approval of that site is considerable. For example, in Case 80003 and Case 80005, there have been PSC Staff recommendations in favor of the alternate site." (Id. at 556-57.)

Another criticism that hits the wider target of any thorough-going alternatives analysis is that the environmental and other data that the utility applicant must furnish is voluminous and costly to gather for one site but overwhelming in volume and cost for two or more possible sites. Moreover "[n]either the regulatory staffs nor participants have adequate resources and expertise to complete significant independent analysis in the face of the massive amount of data and information presented. As a result, in post-application filing phases of the proceeding applicants have been required to submit extensive 'after the fact' analyses which regulations discourage in the first instance by their quantitative data and information bias." (Id. at 558.)

In fact, it is just this huge amount of data required for thorough-going alternatives analysis that probably caused the New York Siting Board to adopt a "two complete case" scheme as a compromise between no alternatives analysis on one hand and thorough-going alternative analysis on the other. It asks for complete information not on all plausible alternatives but on just one plausible alternative. Indeed, the New York Department of Environmental Conservation (DEC) has fixed on the incompleteness and too narrow focus of the "two complete case" scheme to criticize it. They have stated:

> "In summary, DEC favors retaining provisions in the Article VIII law which call for review of alternatives to the proposed primary site. We could support deleting part of 70.2(b)(c) which specifies that a complete case must be prepared on at least two locations. The Department further requests that any deletion be matched by restoration of the broader multi-site comparisons originally intended for Article VII . DEC favors strengthening the use of 70.2(b)(d) which provides that the applicant must provide studies on alternatives

presented affirmatively by any party." Testimony of the Staff of the Department of Environmental Conservation for a Public Hearing on the Public Service Law and Recommendations for Improvements (Feb. 15, 1977) (at 29).

The argument of Cronin and Turner, speaking from the utility point of view, is that attempts to achieve perfectly rational siting through thorough-going alternatives analysis is likely to get no siting at all. They cite the fact that the Article VIII scheme has produced only one power plant certificate in the seven years since its enactment (of seven applications). Cronin and Turner, supra, at 582. But they do not suggest complete abandonment of alternatives analysis, rather they suggest a three phase approach, the first phase of which would be "filing a site selection study proposing a site for approval by the Siting Board." (Id. at 586.) The study "would consist of an investigation and analysis of a number of candidate sites according to established agency criteria." (Id.) They elaborate at some length on a proposal that is perhaps not unlike in essence the current practice of the federal Nuclear Regulatory Commission. NRC requires "one complete case" which if it passes cost/benefit muster will not be upset unless an alternative site is "obviously superior." In the Matter of Public Service Co. (Seabrook Station, Units 1 and 2) 5 NRC 501 (1977). Unlike the thorough-going alternatives analysis in which all alternatives, including the applicant's choice, start as equals, the "obviously superior" type alternatives analysis gives the applicant's choice a presumption in its favor.

The issues over state siting law will no doubt form around approaches to alternative analysis. Resolution of that issue will have a decided effect on statewide planning and ultimately interstate regional planning for power siting.

Cronin and Turner criticize the New York Public Service Commission Staff proposals for a kind of statewide planning, a criticism that could also apply to interstate regional planning:

> "The N.Y. Public Service Commission (PSC) Staff idea has many features that are similar to the phased approach recommended herein, but emphasizes a unitary proceeding approach to final site selection. While this approach includes suggestions that will provide useful information, it suffers from serious deficiencies avoided by the Phase I case-by-case approach. First, the unitary effort to establish preferred sites raises many of the same public participation problems raised by the "two complete cases" alternative of the existing Article VIII process. In a proceeding to choose fifteen to forty preferred sites for Article VIII applications, members of the public with an interest in any one of the preferred sites would have to participate actively to protect their interests even though there would be no assurance that preferred sites approved would be used in the immediate future, or indeed ever used, for a power plant. Thus, the public would be confronted with much the same hypothetical possibilities as alternate site residents face in "two complete cases" proceedings. Moreover, the Siting Board's ad hoc public member would be obligated to participate in a large scale proceeding, much of which may not concern him since the Board also would consider sites in locations in the state in which he has no interest.

"Second, the PSC Staff proceeding would be a necessarily large scale, diffuse effort to approve a large number of acceptable sites, many of which may never be utilized. On the other hand, the case-by-case Phase I proceeding would present the public participant with a firm site and facility proposal for review in the context of the other alternatives available. In contrast to the 'contingency' flavor of the Staff approach, residents in the site areas would be on notice that a power plant will be applied for. The residents must either participate or lose the opportunity to influence site selection.

"Third, the case-by-case system appears to represent a more manageable and efficient process. Proceedings would be held only when a power plant is needed. They could be oriented to the particular population center with electric generating deficiencies. Evaluation of a specific proposal also would allow a more detailed review of environmental, engineering, economic and other factors bearing on preferred site selection than would be possible in a unitary proceeding held to approve a large number of diverse and widely separated sites. The selection of one site raises significantly difficult problems to justify a case-by-case concentration of applicant, agency and public effort.

"Finally, there is some evidence that unitary site proceedings might be utilized by the PSC to seek a ranking or preferential rating for a large number of preferred sites ultimately chosen. Such an approach raises the prospect of the same 'hair splitting' efforts to optimize decision-making on the basis of what would be enormously complex comparisons in the same mold as currently fashioned in the 'two complete case' context. Since many sites can accept power plants in a manner consistent with applicable laws, rules and regulations, and Article VIII goals, the extraordinary costs necessary to determine whether, of those acceptable sites, site A should be utilized before site B or vice versa are not warranted.

"In summary, while the site selection approach of the PSC Staff would constitute an improvement of the current system and warrants serious consideration, the case-by-case site selection process incorporated into Phase I seems preferable.

B. Siting Law in the ORBES States:

OHIO

Ohio is the only state in the ORBES region with a law specific to power plant siting. It establishes a commission whose only function is power siting. The full text of this act in its present amended version and as it originally was enacted plus pertinent parts of the Ohio Public Utilities Act were included as an Appendix in the preliminary report to this study.

Below is a narrative outline of the Ohio Act:

Section 4906.01 *et seq.*, *Ohio Revised Code*

Agency (4906.02)—Power Siting Commission members:

1) chairman of the public utilities commission;
2) director of environmental protection (chairman);
3) director of health;
4) director of economic and community development;
5) director of natural resources;
6) director of energy;
7) representative of the public (an engineer) appointed by the governor;
8) four legislative members—serving as nonvoting members.

Certification must be obtained before the commencement of construction of a major utility facility. The procedures for obtaining a certificate are as follows:

1) An applicant must file an application in such form as prescribed by the commission;
2) The application must be filed at least two years but not more than five years prior to planned construction;
3) The applicant must serve a copy of the application upon the chief executive officer of each municipal corporation and county and the head of each public agency concerned with protecting the environment or of planning land use in the area which any portion of such facility is to be located;
4) Public notice must be given by the applicant within seven days of filing of the application; (See 4906.06)
5) A public hearing must be held by the commission not less than sixty days nor more than ninety days after compliance with nos. 1 through 4. See 4906.07.

The Ohio power siting law is a "one stop" provision; where one agency has the complete authority to resolve all issues involving a sites acceptability. Thus all other state public agencies or political subdivisions are precluded from exercising jurisdiction over power facility siting. See § 4906.13.

In granting a certificate the commission must make certain findings and determinations which are as follows:

1) The basis of the need for the facility;
2) The nature of the probable environmental impact;

3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations;
4) In the case of an electric transmission line, that such facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this State and interconnected utility systems and that such facilities will serve the interests of electric systems economy and reliability;
5) That the facility will comply with Chapters 3704., air pollution control, 3734., solid waste disposal, and 6111., water pollution control, of the revised code and all regulations and standards adopted thereunder;
6) That the facility will serve the public interest, convenience, and necessity.

Interstate coordination of power plant siting activities is contained in the following section quoted verbatim near the beginning of Section 4 of this report. Note that it empowers the commission to coordinate and to make arrangements for coordination. It does not enjoin on the commission a duty to coordinate nor are any mechanisms presently in place for such coordination.

Ohio 4906.14 "Joint proceedings with state or federal agencies."

KENTUCKY

Kentucky has a new law relating to siting but it does not set up a commission devoted exclusively to siting nor does the new law pertain exclusively to siting. The pertinent portions of the new law are summarized as follows:

Kentucky Revised Statutes § 278.010 *et seq.*

Effective April 1, 1979, the energy regulatory commission has exclusive jurisdiction over regulation of rates and services of all energy utilities. Energy utility means any person except a city who owns, controls, operates or manages any facility used or to be used in connection with:

a) The generation, production, transmission or distribution of electricity to or for the public . . . .

The energy regulatory commission consists of three (3) members appointed by the governor with the advice and consent of the Senate.

To begin construction of any facility to be used for the generation of electricity one must first obtain a certificate of environmental compatibility.

The procedures for obtaining such a certificate are as follows:

1) Applicant files a statement of environmental compatibility of the proposed site with the Department for Natural Resources and Environmental Protection;
2) The statement must contain but is not limited to:

a) A complete description of the proposed project;
b) Comments on effects of air pollutants on public health, the effects of facility on the waters of the Commonwealth, the treatment, handling and disposal of solid wastes, and other adverse environmental effects.

3) Within sixty (60) days of receipt of the statement, the department must give its recommendations or objections to the proposed facility to the energy commission;
4) The commission shall conduct a public hearing on the application which is open to all interested persons. Interested persons are those whose living environment would be affected by the construction of the proposed facility.

The factors that must be considered by the commission in granting or denying an application are as follows:

1) Community needs;
2) Industrial development;
3) Customer requirements;
4) Economics of the facility.

These factors are balanced against any adverse environmental factors.

It must be noted that the ALI-ABA Course, "Energy and the Law" lists the Kentucky provision as a "one stop" provision, where one agency has complete authority to resolve all issues involving a sites acceptability. I do not believe that this provision preempts any powers of other political subdivisions. KRS § 278.040 provides that the chapter dealing with the energy commission is not intended to limit or restrict the police jurisdiction, contract right or powers of cities or political subdivisions.

WEST VIRGINIA

West Virginia has no specific power siting agency. However, power siting in West Virginia is controlled by the Public Service Commission, which consists of three (3) members who are appointed by the governor with the advice and consent of the Senate.

According to WV Code § 24-2-11 no public utility person or corporation may begin construction of power facilities until they obtain from the PSC a certificate of public convenience and necessity. The application for such a certificate must contain:*

1) A description of the location and type of facilities;
2) A statement justifying the need for such facilities;

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*These requirements are from the West Virginia Code § 24-2-11a which deals with the certificate of convenience for high voltage transmission lines.

3) A statement of the environmental impact of such facilities; and
4) Any other information the applicant wishes to include or which the commission may require.

Upon filing of the application, the applicant must publish a Class II legal advertisement. Any person may request a public hearing. Within sixty (60) days of filing of the application or if a hearing was held, within ninety (90) days after oral arguments are complete, the commission may approve the application. To approve application the Commission must determine that the proposed facility:

1) Will economically, adequately and reliably contribute to meeting the present and anticipated requirements for electric power;
2) Will result in an acceptable balance between reasonable power needs and reasonable environmental factors.

PENNSYLVANIA

Pennsylvania has no specific power siting agency or law. Power siting decisions are made indirectly by the Public Utility Commission, which consists of five (5) members appointed by the Governor with the advice and consent of the Senate.

A certificate of public convenience and necessity is required before a public utility may begin to offer, render, furnish, or supply servie within the Commonwealth. No specific language requires such a certificate to begin any construction. 66 Penna. Statutes § 1103 requires that every aplication for a certificate be in writing but this section does not specify wat is to be contained in the application.

Subsection (b) of this section places the burden upon the Commsion to hold public hearings. The hearings are to aid in determining tht granting the certificate is necessary for the service, accommodation, convenence, or safety of the public. The PUC does not have sole jurisdiction overpublic service companies or utilities. The Public Utility Code does not ipair the powers and duties of the Department of Health or the Department of Environmental Resources. (66 P. S. § 1310)

INDIANA

Indiana has no specific power siting agency or law. Public Sevice Commission of Indiana, which consists of three (3) members appointed by the governor at least two (2) of whom shall be attorneys has a limited impact on power siing decisions. Certification of public convenience and necessity is required befor any person, copartnership or corporation may own, operate, manage, or control ay plant or equipment of any public utility. The statute is very similar to Pensylvania's statutes 66 P. S. §§ 1121-1123.

ILLINOIS

Illinois has no specific siting agency but like West Virginia one have some law specific to siting. The Illinois Commerce Commission (Ch.111 2/3 § 1 et seq.) consists of five (5) members appointed by the governorwith the advice and consent of the Senate. No construction of any new plant equipment, property or facility which is not in substitution of any existing pant, equipment, property or facility may be initiated without a certificate of public convenience and necessity. The statute does not define what is public convenience and necessity but it has been determined by case law what factors are to be considered. See S.H.A. Ch. 111 2/3 § 56. This does not include municipally owned power facilities. Any person wishing to construct a nuclear steam-electric generating must obtain a permit from the Pollution Control Board. See Pollution Control Board power Ch. 111 1/2 § 1025(a).

C. Model State Siting Law:

1. Outline of model state siting act proposed by National Symposium on State Environmental Legislation (March 1972).

   a. Siting Authority

      1) One siting body to coordinate state agency review in a single proceeding;
      2) Public Participation included in review process by public hearings;
      3) Siting authority's decision subject to judicial review according to state administrative procedures.

   b. Siting Mechanism

      1) Site evaluation five years prior to proposed date of construction and two years before transmission line construction;
      2) An additional requirement might be ten (10) to twenty (20) year pre-planning reconnaissance studies;
      3) Public access to all proceedings by use of state information and education center, public forums for suggestions and critiques, and public hearings;
      4) Review by siting authority of industry assessments of projected generating capacity needs;
      5) Review by siting authority of the formula used to determine future generating capacity needs;
      6) Siting authority vested with eminent domain powers.

   c. Financing Alternatives

      1) Surcharge on power generation at the generator;
      2) Application filing fees;
      3) General appropriations;
      4) Any combination of the above.

2. Outline summary of proposed National Association of Regulatory Utility Commissioners': "Model State Utility Environmental Protection Act."

   a. Siting Authority

      1) The public utility commission provides regulation of plant siting and transmission line routes;
      2) The public utility commission is the final certifying authority for generating and transmission plants of 50 megawatts or more, and for electric transmission lines of design capacity of 125 kilowatts or more;
      3) Regulated utilities are any facility engaged in production,

transmission, storage, sale, delivery, or furnishing of electricity for public use.

b. Applications

1) Certificate of environmental compatibility and public need--required before commencing construction;
2) Contents of application for certificate:
    - i) describe location and design of facility;
    - ii) summarize available environmental impact information;
    - iii) justify the need for the facility;
    - iv) describe alternative sites--comparative merits and detriments;
    - v) reasons for selection of preferred site.
3) Original and copies of application filed with commission;
4) Commission disseminates copies to municipality to be affected and state agencies with environmental protection and land use and planning responsibilities;
5) Application summaries must be published in newspapers of affected locality.

c. Hearings On Application

1) Within 60 to 90 days after filing;
2) Participants may include:
    - i) applicant;
    - ii) municipal and state agency representatives;
    - iii) citizens of affected locality;
    - iv) nonprofit public interest groups;
        - A. to conserve or protect natural beauty;
        - B. protect the environment, personal health, or other biological values;
        - C. represent commerce or industry.
3) Commission may require consolidation of testimony of parties with common interest.

d. Final Decision

1) Decision by commission in form of written opinion;
2) Findings:
    - i) facility serves public interest, need, and convenience;
    - ii) facility is necessary;
    - iii) nature of the environmental impact is minimally adverse considering technology available and the economics of the various alternatives;
    - iv) facility will conform to all applicable state, regional, and local law.
3) Commission may refuse to apply a regional or local law considered unduly restrictive;

4) Rehearings for amendment of certificate may be called if:

    i) environmental impact were substantially affected;
    ii) change in location required;
    iii) aggrieved party petitions within 15 days of issuance of decision.

5) Judicial review may be obtained by aggrieved party in an appropriate state court.
6) Scope of judicial review:

    i) whether commission's decision conformed to state and federal law;
    ii) is supported by substantial evidence on the record as a whole;
    iii) is consistent with provisions of siting law;
    iv) was exercised in an arbitrary, capricious or "undiscretionary" manner.

7) Further review by highest state appellate court. (Editorial note: two step judicial review is a most dubious proposition. The Ohio Power Siting Law is better in this respect.)

e. Other Provisions

1) Siting authority has preemptive power over local governments or other state or regional agencies;
2) Act authorizes joint action with other state or federal agencies;
3) Act authorizes regional or interstate compacts;
4) Ten year forecasts of loads and resources filed annually with commission;
5) Utility granted certification has eminent domain power.

Section 4: State Law as a Solution to the Coordination Problem.

A. Existing State Efforts at Interstate Coordination of Power Siting:

Recognition has been given by official and unofficial studies and by federal and some state laws of the need for interstate coordination of power plant siting on at least a regional level. Little has been done in fact. The Ohio Power Siting Act, for instance, states:

> Ohio Revised Code § 4906.14. Joint Proceedings With State Or Federal Agencies.
>
> The power siting commission, in the discharge of its duties under Chapter 4906 of the Revised Code, may make joint investigations, hold joint hearings within or without the state, and issue joint or concurrent orders in conjunction or concurrence with any official or agency of any state or of the United States, whether in the holding of such investigations or hearings, or in the making of such orders, the commission is functioning under agreements or compacts between states or under the concurrent power of states to regulate interstate commerce, or as an agency of the United States, or otherwise. The commission, in the discharge of its duties under Chapter 4906 of the Revised Code, may negotiate and enter into agreements or compacts with agencies of other states, pursuant to any consent of congress, for cooperative efforts in certificating the construction, operation, and maintenance of major utility facilities in accord with the purposes of such sections and for the enforcement of the respective state laws regarding such facilities. (Emphasis added.)

However, there are no such interstate accords for power siting. Moreover, the Ohio Law (by far the most extensive of the ORBES states) makes no specific provisions for notifying other states or for making them parties, which would allow them "to call and examine witnesses." The Power Siting Commission, however, "shall accept written or oral testimony from any person at the public hearing . . ." (§4906.08(c), Ohio Revised Code). This could include other states.

The Federal environmental acts give authorization to states to negotiate and enter into interstate agreements. The States for the most part (all of the ORBES states) have interstate cooperation commissions which typically are composed of members of both legislative houses (often the leaders) and the executive branch. For example, Ohio and Pennsylvania have seven members from each house and seven from the executive branch, as voting members. Kentucky designates the leadership people of both houses who as members of the Legislative Research Commission also serve as the Commission on Interstate Cooperation; Indiana's commission is similar to Kentucky's. Although the commissions vary some as to membership, their powers and duties are nearly identical. Kentucky's law is typical and reads in part (§ 8.010 *et seq.*, Kentucky Revised Code):

> "[The commission] shall encourage and assist the legislative, executive and judicial officials and employees of the commonwealth to develop and maintain personal contact, with departments, agencies, officials and employees of the other states . . . ."

(§ 8010(1)):

> "The commission shall carry forward the participation of Kentucky as a member of the Council on state governments."

(§ 8010(2)):

> "The commission shall advance cooperation between the commonwealth and other units of government by exercising principal responsibility and authority for:
>
> (a) the proposing of interstate compacts;
> (b) the proposing of uniform laws, model laws and reciprocal statutes;
> (c) the encouraging of uniform or reciprocal administrative rules and regulations;
> (d) the interchange and clearance of research any information;
> (e) any other intergovernmental action . . . that affects intergovernmental cooperation. (§ 8.040(1))

Through these commissions, the Council of State Governments, and other standing interstate organizations of state officials, the means are available to effect coordination without federal help. But in three recent publications of the Council, The States and Electric Utility Regulation, State Planning: Intergovernmental Policy Coordination, and Environmental Resource Data: Intergovernmental Management Dimensions, the emphasis is almost entirely on vertical coordination (federal to state to local) and not to horizontal coordination. The recently enacted Ohio Act creating the Department of Energy (§ 1551.01, Ohio Revised Code (1977)) contains no express provisions for, or even mention of, interstate cooperation. For instance § 1551.02 provides in part that:

> "The director of energy shall establish an office of intergovernmental relations and appoint different employees in the office, each to serve as a full time liaison officer with the federal government, the general assembly, other state agencies and local government, respectively."

In this context "other state agencies" seems to mean "Ohio state agencies." However, the definition of "governmental agency" (§ 1551.01(A)) includes "any unit of a state government" and would seem to mandate the furnishing to other states the ten year forecast a "major utility facility" must annually furnish the state of Ohio (§ 1551.17(B)). It states "[t]he forecast . . . shall be furnished upon request to . . . governmental agencies charged with the duty of protecting the environment . . . ." The Illinois Energy Resources Commission Act (as amended 1977) is devoid of any reference to interstate activity or cooperation. The ORSANCO study cited above concludes:

> ""The nature of most public utility commissions, and other state energy facility siting authorities result in the exclusion of or minimal weight given to regional factors in energy facility siting. There are few institutional or procedural arrangements that exist for the systematic consideration of regional dimensions of facility siting. There exists a need for institutional arrangements to

> provide adequate articulation of regional concerns.' (p. 52) One might say 'essentially no institutional or procedural arrangements.' Even the elaborate New York siting law referred to in the previous section makes only oblique reference to interstate affects or cooperation. Near the end of the recitation of the factors on which the board must base its decision is (§ 146(g)): 'that the facility is in the public interest, considering the environmental impact of the facility, the total cost to society as a whole, the possible available sites or alternative available sources of energy . . . both within the state and elsewhere . . . .'" That is the total reference.

The need for regional coordination and the state mechanisms for effecting such interstate coordination is apparent. Seven years ago in the Environment Reporter Monograph by Berlin, Gill and Yarrington, cited supra, a note of promise and hope was sounded (at p. 11):

> "Despite the fact that power production and consumption as well as concomitant pollution effects have no respect for state boundaries, there has been minimal regional action. The Federal Power Commission has arrangements for regional activity related to interconnected power grids. But the states largely have ignored this aspect of siting policy.
>
> "Perhaps spurred by the prospect of regional requirements under federal law, there are beginnings of interstate action to deal with siting on a regional basis.
>
> "In June 1972, the Midwest Governor's Conference agreed to hold a midsummer meeting on 'Energy and the Environment.' Each of the 15 member states sent its chief advisors on energy needs, environmental protection, and natural resources to lay the groundwork for development of a team to analyze problems on a multistate basis and to consider the interstate impact on the environment of electric power generation and distribution. The overall objective of the midwestern effort was to develop an energy policy for the area.
>
> "A followup meeting was held in mid-October 1972 to work out positions to be presented to each state government, in the hope of achieving legislation or administrative arrangements to expedite solution of interstate siting problems.
>
> "New York State has proposed a tri-state plan for Connecticut, New Jersey, and New York, to establish an 11-state electric supply region under a single coordinating body to deal with the power needs of the New York metropolitan area and to supervise the existing power grid network. Siting and environmental values would be part of the organization's considerations.

> "In the southeast, the Southern Interstate Nuclear Board, consisting of 17 states and a federal representative, is changing its orientation to a broader concern with solving energy problems similar to the midwest program. The board is contemplating requesting legislative changes through congressional action to enlarge the scope of its authorized responsibility.
>
> "In addition, Delaware, Maryland, and Virginia have formed a committee on power plants and the environment, which held meetings in March and October 1972. Participants hope that the committee will prove to be the embryo of a more formal entity capable of coordinating energy policy and production among the three states."

The ORSANCO study sounds a note of cautious optimism at its conclusion by citing: (at 55-56)

> "A Test Demonstration Project recently initiated by the Southern States Energy Board (SSEB), for the Nuclear Regulatory Commission, in North and South Carolina may become the model for future regional energy siting. The SSEB will monitor and work with the two states and Duke Power Company to document a regional process of determining the need for power and to evaluate a site selection methodology. The overall objective of the demonstration process is to work with the states in an actual project to find ways to improve the effectiveness and timeliness of the regulatory process.
>
> "Phase I of the demonstration project (expected completion date August, 1979) develops site-plant alternatives through a logical, subjective, and objective identification of potential sites. Phase II (expected completion date March, 1980) concerns the evaluation by State agencies, federal agencies, and the general public of the site-plant alternatives with the inputs being used to select the two best fossil and nuclear site-plant combinations. Phase III (expected completion date March, 1981) is an actual selection by Duke Power Company of the site for its next thermal base load power station."

Having expanded its activities, the Southern States Energy Board referred to above has only recently changed its name from the "Southern Interstate Nuclear Board," which suggested a much more limited role than it now has. The S.S.E.B. appears to be one of the most active promoters of interstate planning for energy development. At least two states have taken some notice of interstate aspects of power siting: The New Hampshire siting act authorizes consultation with other states who may be affected by the New Hampshire site decision. "More explicitly," continues the Haggard article, supra, (at 395) "the Massachusetts Act is the first state [act] to comprehend that projections made by other utilities in the region are part of the necessary data base for a reasonable evaluation of needs and resources within the state."

B. Potential Use of Uniform or Reciprocal State Legislation:

(1). Introduction:

In 1890 the legislature of the State of New York adopted an act authorizing the appointment of "commissioners for the promotion of uniformity of legislation in the United States." In the same year, a special committee of the American Bar Association, often reciting the action of New York, reported a resolution that the Association recommended the passage by each state and by Congress for the District of Columbia and the territories, of a law providing for the appointment of Commissioners to confer with Commissioners from other states on the subject of uniformity in legislation on certain subjects. As a result of the action of the state of New York and the American Bar Association, the National Conference was originated in 1892.

The National Conference is composed of Commissioners from each of the States, the District of Columbia and Puerto Rico. In thirty-three of these jurisdictions the commissioners are appointed by the Chief Executive acting under express legislative authority. In other jurisdictions the appointments are made by general executive authority. The Commissioners are appointed by the governor of each state. There are usually three representatives from each jurisdiction. The term of appointment varies, but three years is the usual period. The commissioners are all from the legal profession being lawyers, judges or law professors.

The National Conference works through standing and special committees. Whenever a subject for an act is proposed, it is referred to a standing Committee on Scope and Program. The committee determines whether the subject merits consideration by the Conference and makes its recommendation to the Executive Committee. If the Executive Committee determines that a proposed act merits consideration by the Conference, the President of the Conference assigns the subject to a standing or special committee. It is the responsibility of this committee to determine whether the subject is one on which an act should be drafted and whether the act should be designated as "uniform" or "model." A model act is an act covering a subject on which the commissioners do not feel that uniformity between the states is necessary, but where it would be helpful to have legislation which would tend toward uniformity and serve as a model—a sort of ideal law both in form and substance, like the Model Penal Code.

If the Special Committee recommends that a uniform or model act be drafted, the President refers the subject to a special committee to draft an act. With respect to some of the more important acts, it has been customary to employ an expert draftsman. The President also appoints a Review Committee to screen the draft before it is presented to the National Conference.

Tentative drafts of acts are submitted from year to year and are discussed section by section. Each uniform draft is thus the result of one or more tentative drafts subjected to the criticism and correction of the Commissioners. Acts are not approved by the Conference until they have been considered section by section, by at least two annual Conferences.

Securing the adoption of uniform and model acts of the National Conference is the responsibility of the Legislative Committee, a part of the National Conference. With the endorsement of the American Bar Association, this committee urges the enactment of the acts in each jurisdiction. As of 1975, the

National Conference had drafted and approved two hundred and fifteen acts. Due to superseding of acts and withdrawing of acts there were a total of one hundred thirty-five acts being recommended for adoption in 1975.

The Uniform Commercial Code (UCC) is the most conspicuously successful of the uniform acts. It was the result of over than twenty years of intense study. In 1938, a proposal was sponsored by the Merchants Association of New York City for a federal sales act to govern all interstate sales transactions. Eventually this proposal resulted in the National Conference of Commissioners on Uniform State Laws adopting a proposal to prepare a uniform commercial code. The code was to be a modernization and co-ordination of several Uniform Acts in the field of commercial law including two very important and successful acts, the Uniform Sales Act promulgated in 1906 and the Uniform Negotiable Instruments Law promulgated in 1896. The American Law Institute joined in the undertaking in 1941.

Between 1945 and 1952 a great number of drafts and redrafts of parts of the proposed code were prepared by a reportorial staff supervised by an Editorial Board. The Chief Reporter for the Code was Professor Karl N. Llewellyn and the Associate Chief Reporter was Professor Soia Mentschekoff both of the University of Chicago Law School. The first complete draft of the Code was released in May, 1949. It was not until 1952 that an official edition of the Code with explanatory comments was published. In 1953, Pennsylvania became the first state to enact the UCC.

As a result of changes suggested by the Law Revision Commission of New York and those emanating from experience with the Code in Pennsylvania, the National Conference and the ALI revised the Code in 1958. A further revision was undertaken in 1962 which resulted in the current text. The Code has been adopted in 49 states, the District of Columbia and the Virgin Islands. Louisiana is the only state without the Code.

Most other Uniform Acts have not faired as well as the UCC. The Uniform Interstate Arbitration of Death Taxes Act has been adopted by only sixteen jurisdictions while the Uniform Reciprocal Enforcement of Support Act, has been adopted by twenty-five jurisdictions.

Uniform and model acts are now an important source of state legislation. Each of the fifty states has on the average enacted 28 of these uniform or model acts written and promoted by the conference, with the range being 43 enactments [by Colorado and North Dakota] to 17 enactments [by Louisiana]. And this is counting the Uniform Commercial Code as only one act although it is in reality a collection of eight acts covering every aspect of commercial trade from sales through bank notes to secured transactions. The states in the ORBES region have enacted these Conference-sponsored acts at about the national average.

In Reisman and Simson, Interstate Agreements in the American Federal System, 27 Rutgers L. Rev. 70, 82 (1973) the authors say:

> "The number of jurisdictions adopting the uniform laws is a coordinate index for trends in informal interstate promotion and prescription. The Council of State Governments, an amalgam of 50 state commissions with central and regional secretariats, is the principal promotional arm of the National Conference. Yet, more focused agitation is

practiced by other interstate associations, state officials acting together cooperatively and coordinately below the associational level, and private interest groups. Hence, the enactment statistics for uniform laws tentatively reflect broadly on interstate promotion in general rather than on the promotional competence of the Council."

Apropos this report, the Conference proposed a Uniform Public Utilities Act in 1928. By 1943 no state had adopted it so it was withdrawn as obsolete.

(2). Some uniform state acts viewed as potential models:

Uniform Interstate Arbitration of Death Taxes Act (U.L.A.) § 1. (Vol. 8, p. 261)

§ 1 (Arbitration Agreement) (West Virginia has adopted. See § 11-11B-1 et seq. W. Va. Code.)

When the [tax commission] claims that a decedent was domiciled in this state at the time of his death and the taxing authorities of another state or states make a like claim on behalf of their state or states, the [tax commission] may [with the approval of the attorney general] make a written agreement with the other taxing authorities and with the executor or administrator to submit the controversy to the decision of a board consisting of one or any uneven number of arbitrators. The executor or administrator is hereby authorized to make the agreement. The parties to the agreement shall select the arbitrator or arbitrators.

§ 2 (Hearings)

The board shall hold hearings at such times and places as it may determine, upon [reasonable] notice to the parties to the agreement, all of whom shall be entitled to be heard, to present evidence and to examine and cross-examine witnesses.

Massachusetts passed a slight variation on § 2 which reads:

> "Such board shall hold hearings at such places as are deemed necessary, upon reasonable notice to the executors, ancillary administrators, all other interested persons, and the taxing officials of the states involved, all of whom shall be entitled to be heard.
>
> "Such board shall apply, whenever practicable, the rules of evidence which prevail in federal courts under the federal rules of civil procedure at the time of the hearing."

Uniform Interstate Compromise of Death Taxes Act (U.L.A.) (Vol. 8, p. 274)

§ 1 (Compromise Agreement; Filing; Interest or Penalty for Non-Payment of Taxes)

When the [tax commission] claims that a decedent was domiciled in this state at the time of his death and the taxing authorities of another state or states make a like claim on behalf of their state or states, the [tax commission] may [with the approval of the attorney general] make a written agreement of compromise with the other taxing authorities and the executor or administrator that a certain sum shall be accepted in full satisfaction of any and all death taxes imposed by this state, including any interest or penalties to the date of filing the agreement.

The agreement shall also fix the amount to be accepted by the other states in full satisfaction of death taxes. The executor or administrator is hereby authorized to make such agreement. Either the [tax commission] or the executor or administrator shall file the agreement, or a duplicate, with the authority that would be empowered to assess [determine] death taxes for this state if there had been no agreement; and thereupon the tax shall be deemed conclusively fixed as therein provided. Unless the tax is paid within [ ] days after filing the agreement, interest [or penalties] shall thereafter accrue upon the amount fixed in the agreement but the time between the decedent's death and the filing shall not be included in computing the interest [or penalties].

Substantial variations for the various states adopting this act. [omitted]

§ 2 (Definition of State)

As used in this act the word "state" means any state, territory, or possession of the United States, and the District of Columbia.

§ 3 (Interpretation)

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 4 (Short Title)

This act may be cited as the "Uniform Act on Interstate Compromise of Death Taxes."

§ 5 (Time of Taking Effect)

This act shall take effect [ ], and shall apply to estates of decedents dying before or after its enactment.

Uniform Controlled Substances Act (U.L.A.) § 504 (Vol. 9, p. 333)

60A-5-504 (W. Va. Code) Cooperative Arrangements and Confidentiality

a) The [appropriate person or agency] shall cooperate with Federal and other State agencies in discharging his [its] responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he [it] may:

(1) arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;
(2) coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;
(3) cooperate with the Bureau by establishing a centralized unit to accept, catalogue, file, and collect statistics, including periods of drug dependent persons and other controlled substances law offenders within the state, and make the information available for Federal, State and local law enforcement purposes. He [it] shall not furnish the name or identity of a patient or research subject whose identity could not be obtained under subsection (c); and

(4) conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

Uniform Narcotic Drug Act (U.L.A.) § 19 (Vol. 9, p. 760)

"Enforcement and Cooperation" § 19

It is hereby made the duty of the [official-agency], its officers, agents, inspectors, and representatives, and of all peace officers within the state, and of all county attorneys to enforce all provisions of this act, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of the State, and of all other states, relating to narcotic drugs.

Uniform Reciprocal Enforcement of Support Act

This is one of the most widely used acts calling for constant interstate cooperation. Because of its reciprocal nature [our local children will not get support from their out of state parents unless we make local parents support their out of state children] the act has worked quite well. Pertinent parts are as follows:

§ 1 (Purposes)

The purposes of this Act are to improve and extend by reciprocal legislation the enforcement of duties of support.

§ 2 (Definitions)

(d) "Initiating state" means a state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced. "Initiating court" means the court in which a proceeding is commenced.
(k) "Rendering state" means a state in which the court has issued a support order for which registration is sought or granted in the court of another state.
(l) "Responding state" means a state in which any responsive proceeding pursuant to the proceeding in the initiating state is commenced. "Responding court" means the court in which the responsive proceeding is commenced.

§ 5 (Interstate Rendition)

The Governor of this State may:

(1) demand of the Governor of another state the surrender of a person found in that state who is charged criminally in this State with failing to provide for the support of any person; or
(2) surrender on demand by the Governor of another state a person found in this State who is charged criminally in that state with failing to provide for the support of any person . . . .

§ 12 (Officials to Represent Obligee)

If this State is acting as an initiating state the prosecuting attorney upon the request of the court [a state department of welfare, a county commissioner, an overseer of the poor, or other local welfare officer] shall represent the obligee in any proceeding under this Act. (If the prosecuting attorney neglects or refuses to represent the obligee the [Attorney General] may order him to comply with the request of the court or may undertake the representation.) (If the prosecuting attorney neglects or refuses to represent the obligee, the [Attorney General] [State Director of Public Welfare] may undertake the representation.)

§ 14 (Duty of Initiating Court)

If the initiating court finds that the [petition] sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property it shall so certify and cause 3 copies of the [petition] and its certificate and one copy of this Act to be sent to the responding court. Certification shall be in accordance with the requirements of the initiating state. If the name and address of the responding court is unknown and the responding state has an information agency comparable to that established in the initiating state it shall cause the copies to be sent to the state information agency or other proper official of the responding state, with a request that the agency or official forward them to the proper court and that the court of the responding state acknowledge their receipt to the initiating court.

§ 17 (State Information Agency)

(a) The [Attorney General's Office, State Attorney's Office, Welfare Department or other information Agency] is designated as the state information agency under this Act, it shall

   (1) compile a list of the courts and their addresses in this State having jurisdiction under this Act and transmit it to the state information agency of every other state which has adopted this or a substantially similar Act. Upon the adjournment of each session of the [legislature] the agency shall distribute copies of any amendments to the Act and a statement of their effective date to all other state information agencies;
   (2) maintain a register of lists of courts received from other states and transmit copies thereof promptly to every court in this state having jurisdiction under this Act; and
   (3) forward to the court in this State which has jurisdiction over the obligor or his property petitions, certificates and copies of the Act it receives from courts or information agencies of other states . . . .

§ 34 (Appeals)

If the [Attorney General] [State Director of Public Welfare] is of the opinion that a support order is erroneous and presents a question of law warranting an appeal in the public interest, he may

(a) perfect an appeal to the proper appellate court if the support order was issued by a court of this State, or

(b) if the support order was issued in another state, cause the appeal to be taken in the other state. In either case expenses of appeal may be paid on his order from funds appropriated for his office . . . .

(3). Advantages and disadvantages of state law solution:

The advantages of state law facilitated coordination are clear--no interstate agreement need be reached and no state sovereignty need be sacrificed either to an interstate organization or to the federal government. A state therefore can act unilaterally and hope others will follow its lead. If the act is reciprocal no obligation to another state is incurred until that state passes substantially the same act. Thus a simple information-on-siting exchange act will not obligate a passing state to send siting information to any state whose reciprocation is not guaranteed by the passage of a similar act. A state could pass such an act on a nonreciprocal basis in the hope that this jester would lead other states to voluntarily (i.e., administratively, without legislative act) make reciprocal information available. But in this context a reciprocal act usually seems more acceptable to legislators.

The incentive to pass reciprocal acts is age old: "if you'll scratch my my back I'll scratch yours." If, say, Ohio wants to have an input into Indiana siting, then all Ohio need do is pass a law allowing Indiana to participate, indicating the extent of that participation and conditioning such participation on a similar allowance by Indiana of Ohio participation in its siting decisions. Similarly, Ohio might say if we have a dispute as to a siting decision, or you do not like a siting decision of ours, we will submit it to interstate arbitration if you will do the same if we dislike your decision. (See, for example, the Uniform Interstate Arbitration of Death Taxes Act sited above.) Of course, states could submit disputes to arbitration on an ad hoc basis, but once a dispute has arisen, agreeing on an arbitration panel and procedure is about as difficult as settling the underlying dispute. With the reciprocal act model, Ohio, for example, need not have any other state agree to so arbitrate, it simply passes the act and the passage of a similar act by another state is agreement. If no one else passes such an act, nothing is lost.

One of the disadvantages of a reciprocal legislative solution is that it is somewhat difficult to pass an act that another state will like in sufficient detail, such that the other state's passage of its act is really reciprocal. The two acts need not be precisely the same in order to create reciprocal obligations but they must be substantially the same. Moreover, if the process of the National Conference of Commissioners of Uniform State Laws is used drafting and promoting reciprocal legislation could be very time-consuming, as the discussion of the "Conference" (above) indicates.

A second problem is that the states interested in coordination in this matter, may have such dissimilar siting laws (as is true in the ORBES region) that a reciprocal allowance of participation in each other's siting decisions may be clearly more advantageous to one than the other, i.e., the backs proposed to be scratched are very dissimilar, one much itchier or larger than the other. Ohio with its one stop procedure and clear criteria for decision may (to strain the metaphor a little further) have a relatively small back compared to Indiana with its less than clearly set process. In fact the advantages might be the other way around but the dissimilarity would cause enough uncertainty as to give pause to both parties. (A rabbit and a squirrel probably would not offer to scratch each other's backs.)

Two things might mitigate this disadvantage: a very modest and simple act, for instance, one merely offering to exchange information; or the reciprocal legislation could be tied to uniform siting legislation, for instance, Ohio might condition its reciprocal behavior on another state's having both a reciprocal exchange of data law and similar interval siting legislation (or, at least, an interval siting process that conforms to certain minimum standards). However, a very simple act does not effect much coordination and could still be worrisome where, for instance, a state passing a data exchange act generates a large quantity of, or well organized, data and the reciprocating state does not. On the other hand, if the reciprocal act is tied to certain requirements as to internal siting legislation, there may be few potential reciprocators.

A third problem with reciprocal legislation is that the passage of a reciprocal act is an offer to all other states. Ohio, say, may want to participate in Indiana's siting but not care about participating in Pennsylvania's siting and not want Pennsylvania participating in Ohio's siting. State reciprocal legislation is unlike the offer of a unilateral contract, which can be specifically directed. States cannot discriminate in this fashion. Since the problem of advected air pollution, a major cause of the need for interstate coordination in power siting, does not create obvious mutual trade offs, (air currents go mainly one way) this might prove a major impediment to accord, either by reciprocal law or compact.

One of the ways some of the problems of reciprocal legislation might be solved in the context of the Ohio River Basin energy siting is to use a compact arrangement, new or existing, to create reciprocal legislation tailored to the needs of the basin. Such a compact could create an agency that could act more quickly than the Council acts in drafting legislation for the states to adopt. Perhaps the lack of mutual environmental trade offs in this context (the Ohio River flowing east to west would probably not create a sufficient trade off to induce accord) is offset by trade offs of a different kind--the mutual desire by states to avoid federal takeover of the siting problem. Since in a federal union the central government is likely to act when it sees its member states unable to resolve their mutual conflicts or effect necessary coordination, the threat of some federal action through either the federal courts or Congress might create sufficient mutuality of interest to generate accord. Reciprocal legislation, a kind of "offer-at-large" to enter a contract by the act of passing similar legislation is one way to reach agreement in a federal union.

One final disadvantage of reciprocal laws (beyond the obvious fact that without an implausibly detailed reciprocal law they can achieve only limited coordination) is that, if the coordination need among the ORBES states is truly regional in scope, one or two states refusing to pass a proposed act may make it unworkable. Let's say all but Ohio of the ORBES states pass reciprocal data exchange laws, will the missing Ohio data make the other exchanges meaningless? Probably not entirely, but I do not know.

In summary, then, reciprocal legislation might be at least a partial solution to the coordination problem. Let us then look more closely at some possible reciprocal acts.

(4). An example of a model uniform interstate coordination act for power plant siting:

The simplest model would be an act for the exchange of siting information. For example, such an act might look something like the following:

> "§ 1, The purpose of this act (call it the Interstate Power Siting Data Exchange Act) is to provide for the exchange of information with other states as to proposed electrical generating facilities sites and their environmental impacts, economic effects, energy resource use and other possible affects so that each state can act in making its own decisions about site and facility certification in the light of more complete information as to out of state impacts and alternatives.
>
> § 2, The (Director of Energy) shall furnish to any agent of another state charged with energy planning, power plant siting or environmental protection and who is authorized by that state's law to request and who does so request the following information:
>
> (A) the ten year forecasts of energy consumption in this state by region or in whatever form and whatever detail it is possessed;
> (B) the ten year forecasts as to new generating facility site locations, their proposed size, fuel type, etc.;
> (C) whatever information about air pollution emissions, [etc., as to specific environmental impacts] likely to be caused by the sites mentioned in (B);
> (D) any specific proposals for new generating facility sites in the state, all the information in the possession of the (department of energy) concerning any proposal and the time or times and place or places that any hearings may or will be had on such proposal and any other procedures pertaining to such proposal;
> (E) [etc., etc., whatever other information might be available and useful but, to avoid quarrels as to relevancy, the specification should be fairly detailed].
>
> The information set out in § 2, need only be furnished once a year to any requesting state and then only to a requesting state that has a law identical with or substantially similar to this act. Any state that furnishes this state's appropriate agent the information as set out above without a law so mandating may be furnished such information by the director at his sole discretion.
>
> § 3, The (Director of Energy) shall be the sole agent in this state authorized to request and receive from another state the information set out above. The director is responsible to disseminate the information received to the appropriate agencies of this state for their use."

A similar model might authorize a procedure for comments by the other enacting states on the information exchanged. Or it might authorize any other enacting state to be a party at its own request to any siting procedure. Or it might formalize the interstate comment procedure, which would be but a step from mutual planning.

A different model, might provide for siting dispute resolution by establishing an arbitration procedure or a compromise procedure. The uniform death taxes acts, cited above, could serve as prototypes, but the dispute here is substantially more complex than mere domicile determination or tax division as in the two prototypes. Such arbitration might be preferable to adjudication, but arbitration often leads to adjudication over the arbitrators jurisdiction or mandate. And whether a federal court would specifically enforce such a provision is doubtful. There are no precedents for mandatory arbitration of interstate disputes.

CHAPTER III. INTERSTATE COMPACTS

Potential for the use of an interstate compact as a solution to the coordination problem.

The use of the Congressionally sanctioned interstate compact device to effect regional coordination in the electrical utility industry was urged over fifty years ago by the late Felix Frankfurter, then a well-known Harvard law professor, later a justice of the United States Supreme Court. In an article with James Landis called *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 658 (1925) he stated:

> "Public utility regulation discloses a steady contraction of control by individual States and a corresponding absorption of authority by the Federal Government . . . . Apart from the railroads, however, there is still left a wide and vital sphere of interstate communications which project beyond State lines but are nevertheless predominantly regional rather than national in their penetration. Congress has left a considerable part of this field unregulated just because it is essentially local or regional in its significance and because the burden of national oversight would be excessive and ineffective. Here, again, there is need for regulation by the unified action of the affected region. Again we find resort to compact . . . . Throughout the country local utilities cross state lines and raise irritating difficulties over regulation. State compact furnishes an effective answer . . . . *Here is a ready means for avoiding undue congestion at Washington and the ineffectiveness of individual state control.*" (*Id.* at 703-04, emphasis added.)

After some discussion of the use of the original jurisdiction of the Supreme Court to settle interstate disputes, Frankfurter and Landis stated:

> "But most questions of interstate concern are beyond the jurisdiction of the Supreme Court; they are beyond all court relief. Legislation is the answer, and legislation must be coterminous with the region requiring control. We are dealing with regions, like the Southwest clustering about the Colorado River . . . which are organic units in the light of a common human need like water-supply. The regions are less than the nation and are greater than any one state. The mechanism of legislation must therefore be greater than that at the disposal of a single State. National action is the ready alternative. But national action is either unavailable or excessive . . . . With all our unifying processes nothing is clearer than that in the United States there are being built up regional interests, regional cultures and regional interdependencies. These produce regional problems calling for regional solutions. Control by the nation would be ill-conceived and intrusive . . . . As to these regional problems Congress could not legislate effectively. Regional interests, regional wisdom and regional pride must be looked to for solutions.

> The regional economic areas demand continuity of administrative control insofar as control is to be exercised through law. The central problem of law, it is becoming clearer every day, is enforcement. Experience overwhelmingly demonstrates that the demands of law upon economic enterprises, like the modern utilities, cannot be realized through the occasional explosions of law-suits but call for the continuity of study, the slow building-up of knowledge, the stimulation of experiments, the initiative in enforcement which can only be secured through a permanent, professional administrative agency. The inventive powers exacted from modern State legislatures must grapple with problems whose stage is an interstate region. Collective legislative action through the instrumentality of compact by States constituting a region furnishes the answer.
>
> Perhaps the sharpest emergence of this problem is due to the widespread development of electric power." (Id. at 707-08.)

Frankfurter's remarkably presentient view of the electrical utility industry continues:

> "In brief, an integration is proposed of a vast network of generating plants, transmission lines and distributing stations, heretofore independent in their operations and therefore individually confined to their territorial radius." (Id. at 710.)
>
> "Time alone can tell the extent to which these plans will be realized and the exact forms which they will take. This is not the occasion to express either one's hopes or one's fears. But legal pre-vision may certainly presuppose a vast interrelated network of electric power freely playing across State lines, serving industrial centers and affecting scattered communities which themselves constitute individualized industrial and social units." (Id. at 711.)
>
> "[Herbert] Hoover has thus stated the practical situation which confronts lawyer and legislator:
>
> 'All this means the liquidity of power over whole groups of States. At once power distribution spreads across State lines and into diverse legal jurisdictions. We are, therefore, confronted not only with problems of the coordination in the industries of their engineering, financial and ownership problems, but also with new legal problems in States rights and Federal relations to power distribution.'
>
> The shallow answer to this plethora of problems is Federal control, predicated on the surface fact that we are in the field of interstate commerce. There is proposed a Federal Commission with authority over power, analogous to that exercised by the Interstate Commerce Commission over railroads." (Id. at 712.)
>
> "Again, the problems of transmission are not capable of being drawn completely within the area of solution by Congress, even if such a course were advisable. To be sure, the transmission of electricity across State borders is interstate commerce and as such subject to the Federal power evolved for the control of such commerce with its

> immunity against discrimination by State action. But to a considerable extent the future will have to deal, as does the present, with transmission and its facilities limited entirely to the confines of a single State. Yet some coordination of policy between these Statewide transmission systems and interstate transmission will call for a mechanism of control regional and not merely State-wide in its operation, in order to secure interconnection, exchange and distribution of power." (Id. at 714.)
>
> "Here, as elsewhere in the domain of public law, the legal mechanism should evolve from actualities. Despite all mechanical invention and depressing forces for standardization, the United States by virtue of its size reveals distinct regions with differences of climate, geography, economic specialization, and social habits. The integration of the power industry is likewise assuming regional forms.
>
> From this analysis issues the legal answer. The regional characteristic of electric power, as a social and engineering fact, must find a counterpart in the effort of law to deal with it. No single State in isolation can wholly deal with the problem. The facts equally exclude the capacity of the Federal government to cover the field. Co-ordinated regulation among groups of States, in harmony with the Federal administration over developments on navigable streams and in the public domain, must be the objective. Regional solutions in such new and complicated demands upon law must necessarily be empiric and cautious in their unfolding. The exact form of future legal devices will have to be modified from time to time and from region to region, adapted to varying conditions and, it is to be hoped, built on a growing body of experience. The vehicle for this process of legal adjustment is at hand in the fruitful possibilities inherent in the Compact Clause of the Constitution.
>
> It is this solution which Governor Pinchot is pressing upon his own and neighboring States. Only most painstaking study by lawyers saturated with the practical problems, in collaboration with engineers and social economists, can bring the proposal to fruition." (Id. at 717-18. Emphasis added.)

After further discussion of the constitutional difficulties both of direct federal control or of compact control of the problem (difficulties that no longer obtain) Frankfurter and Landis concluded:

> "The imaginative adaption of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by the growing interdependence, social and economic, of groups of States forming distinct regions. It may well be that the New England States, the Middle Atlantic States, the Pacific Coast States and similar groupings will each evolve, through compact, common industrial standards, thereby recognizing diversities not coincident with the capricious boundaries of forty-eight States nor yet to be resolved by a flat common denominator nationwide in its operation. Time and circumstances alone must determine the existence of such diversities and common needs and the wisdom of regional rather than national treatment. The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths 'States-Rights' and 'National Supremacy.' We must not deny ourselves new or

> unfamiliar modes in realizing national ideals. Our regions are realities. Political thinking must respond to these realities. Instead of leading to parochialism, it will bring a fresh ferment of political thought whereby national aims may be achieved through various forms of political adjustments." (Id. at 729.)

Fifty plus years have passed since this exhortation to action and no regional compacts have materialized in the electrical utility area. The Federal Power Commission (discussed in Chapter I) and regional organizations of the private utility industry have come into being. Moreover vast new federal environmental and energy resource regulatory schemes affecting the electrical utility industry have recently come into being. This new federal law is largely left to individual state implementation with no immediate provision for regional interstate coordination of effort. Congress has invited such coordination through general compact authorization as in the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816, Sec. 103(b)):

"INTERSTATE COOPERATION AND UNIFORM LAWS"

> "Sec. 103. (a) The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform State laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution. (b) The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the Congress."

The following two sections of this report (5 and 6) will explore the compact device as a means of interstate regional coordination of federal-state regulation affecting power plant siting.

Section 5: The Interstate Compact as an Institutional Device for Interstate Cooperation and Coordination.

A. Background: The Nature, History, Some Examples of, and the Literature on Interstate Compacts:

(1). What is an interstate compact?

"No state shall enter into any Treaty, Alliance or Confederation . . . . No state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another state." Art. 1, § 10, cl. 3, U.S. Const. This is the sole reference in the constitution to interstate agreements. Does this mean that any and all agreements between states need Congressional approval? The answer is a clear no. Only those "compacts" or "agreements" (the two words have no different legal significance in this context) require Congressional approval that are "combination[s] tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). This test was recently reiterated and the Compact Clause and its history discussed at some length by the Supreme Court in *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) which upheld the constitutionality of the Multistate Tax Compact, a rather elaborate administrative compact (among 19 states currently), even though it lacks congressional approval. This compact created a Multistate Tax Commission composed of the tax administrators of all member states. The Commission had the following powers (giving only the verb used in the compact): "to study", "to develop and recommend", "to compile and publish"; (adding some non-verbs) to adopt "advisory only" uniform administrative regulations, and finally, the most controversial power, "to conduct audits" at the requests of member states who have specifically adopted the audit section (Art. VIII) of the compact and to enforce by compulsory judicial process its auditing power in the states specifically approving this audit section. In fact, Art. VIII, § 5, allows the Commission to initiate certain audits that the Commission thinks would be of interest to some of its member states. (See 434 U.S. at 492 [White, J., dissenting].) Any member state can withdraw from the compact at any time. (Illinois and Indiana both recently withdrew.) The majority held that none of these powers or the sum total of the cooperative venture "enhances state power *quoad* the National Government" (*id.* at 473) or "present opportunities for enhancement of state power at the expense of the federal supremacy" (*id.* at 470) or has a "potential impact" on "federal supremacy" (*id.* at 472). All the phrases being various ways to put the *Virginia v. Tennessee* test quoted above.

This 1978 case then suggests that if little direct compulsory power is given its administrative organ, multi-state compacts of a fairly elaborate order can be established legally without Congressional consent. Twelve different bills had been introduced between 1964 and 1975 to gain Congressional approval for the Multistate Tax Compact (*id.* at 456, nn.3 and 4, and at 486-87); none got out of committee (*id.* at 479, n.33).

This case then means that there are essentially three kinds of interstate compacts that also have administrative organs separate from any state and organic to the compact: (1) Compacts approved by Congress with Congress as a full participant, (2) Compacts approved by Congress but with no or only nominal Congressional participation, (3) Compacts without Congressional consent but with legal force.

Two further points: even if a compact is so weak as not to require congressional approval, such approval may be desirable to encourage federal-state cooperation. On the other hand, there may be an upper limit on the powers that can be given through a compact even with congressional approval. Act I, § 10, cl. 1 places an absolute ban on states entering into "Any Treaty, Alliance or Confederation" with or without the consent of Congress. (See *id.* at 460-64.) No "compact" has ever been declared unconstitutional because by its nature it was really a proscribed "Treaty, Alliance or Confederation".* Nonetheless the possibility remains. The Supreme Court in U.S. Steel Corp. v. Multistate Tax Comm'n., supra at 460-64, commented:

> "The Framers clearly perceived compacts and agreements as differing from treaties. [Footnote quoting from the Articles of Confederation and Wharton v. Wise, 153 U.S. 155, at 167 and 170-71 (1894) omitted.] The records of the Constitutional Convention, however, are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause. [Footnote omitted.] This suggests that the Framers used the words 'treaty', 'compact', and 'agreement' as terms of art, for which no explanation was required [long footnote, citing Engdahl, infra, (Section 5, A (3)), and Frankfurter and Landis, supra and Weinfeld, What did the Framers of the Federal Constitution Mean by "Agreements" and "Compacts"?, 3 U. Chi. L. Rev., 453 (1936) omitted] and with which we are unfamiliar. Further evidence that the Framers ascribed precise meanings to these words appears in contemporary commentary. [Footnote omitted.]
>
> Whatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost. In 1833, Mr. Justice Story perceived no clear distinction among any of the terms. [Footnote quoting from Story's 'Commentaries on the Constitution of the United States' omitted.] Lacking any clue as to the categorical definitions the Framers had ascribed to them, Mr. Justice Story developed his own theory. Treaties, alliances and confederations, he wrote, generally connote military and political accords and are forbidden to the States. Compacts and agreements, on the other hand, embrace 'mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other.' (Citation to his 'Commentaries' omitted.)"

Two general comments are warranted on the distinction between "treaties, etc.," on one hand, and "compacts". First, if treaties are "political accords" as Story suggested (see, also, Thursby, supra, at 50) and the word political were given the meaning the Supreme Court has accorded it in recent years, i.e., questions of policy that are fit only for legislative judgment are "political questions", then any accord which gave significant legislative authority to a compact agency might be a forbidden "treaty". However, this meaning of the word "political" has been developed in the context of exempting some constitutional questions from judicial review as "political questions". See Baker v. Carr, 369 U.S. 186 (1962). If the question as to what is a republican form of government within the meaning of the Guaranty Clause (Art. 4, § 4, U.S. Const.: "The United States shall guarantee to every state in the Union a Republican Form of Government . . .") is a nonjusticiable, political question (Luther v. Borden, (U.S.) 7 How. 1 (1849) reaffirmed in Baker v. Carr, supra at 218-26) then the difference between a forbidden "treaty" and a permissible "compact" would be a "political question" such that Congressional consent to an interstate accord as a "compact", which would imply a Congressional finding that the accord is a permitted "compact", would be a final resolution of the constitutional issue and the Court would not review it. Thus whether the "political nature" of an accord converts it into a forbidden "treaty" is itself a "political question" to be conclusively resolved by Congress in their deliberations over whether to assent to it. Moreover, the Supreme Court has recently held that when an interstate regional compact agency is exercising legislative authority its members are absolutely immune from federal damage liability the same as state legislators. The Court apparently assumed that Compact agencies could be given legislative authority. Lake Tahoe Estates Inc. v. Tahoe Regional Planning Agency, 99 S.Ct. 1171, 1178-80 (1979). The dissenting opinions of Marshall and Blackman would have denied absolute immunity on the basis that compact agency members are "not subject to the responsibility and the brake of the electoral process." (Id. at 1181.)

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*But, see, Thursby, Interstate Cooperation, A Study of the Interstate Compact, (1953) in a section called "Treaties and Compacts Distinguished", pp. 23-33, the author cites Williams v. Bruffy, 96 U.S. (60 Otto) 176 (1877), as saying acts of the Confederate States of America were void because the Confederacy violated the absolute ban on alliances, treaties and confederacies. However, one might have thought that secession from the Union was the greater sin (see, Lamar v. Micow, 112 U.S. 452, 476 (1884)) such that a "confederacy" within the union would be readily distinguishable.

Which brings us to a final general comment: One commentator has suggested that if an agency is given considerable legislative authority and each appointing state has an equal voice even though the populations of the states are vastly different, then it might violate the one person, one vote rule of Reynolds v. Sims, 377 U.S. 533 (1964) and progeny. See T. Ernst, Legal Problems Affecting Interstate Transportation Agencies, 11 Valparaiso L. Rev. 351, 367-70 (1977). It is difficult to take this concern very seriously. Any delegation of legislative authority to a compact agency great enough to invoke one person, one vote concerns would probably be beyond the contracting states constitutional authority to delegate and certainly be beyond its political willingness as a practical matter.

(2). Brief history of interstate compacts:

Although interstate agreements go as far back as 1664, when the colonies of Connecticut and New York agreed on a boundary line in dispute, Compacts of a regional scope creating permanent interstate agencies of various powers did not come into existence until the 1920s. Until then compacts were usually bi-state boundary arrangements. According to Barton, Interstate Compacts and the Political Process (1967), there were 36 compacts between 1783 and 1920, 65 between 1921 and 1955, and "more than a score" between 1955 and 1967. A current compilation of Compacts (Interstate Compacts 1783-1977 (A Revised Compilation)) published by the Council of State Governments in 1977 shows there to be 48 Regional Compacts (id. at 31) extant.

Two things conspired to cause the radical increase of interstate compacts after 1921: (1) "The growing necessity in modern times for common or even joint administration to cope with problems that now transcended state lines" (Zimmerman and Wendell, p. 1) and (2) limiting decisions of the Supreme Court as to federal power under the commerce clause or tax clause to solve the problems by direct federal control. (Since 1937 the Supreme Court has taken a very broad view of federal commerce clause power thus eliminating this second impetus enter into compacts.) Moreover, once the compact device was seen as a feasible means of regional control of certain interstate problems, the more it was tried for other problems--i.e., its success bred more use. The pioneer compacts of the modern regional administrative breed were the Colorado River Compact of 1921, ratified by Congress in 1928 in the Boulder Canyon Project Act, and the New York Port Authority Compact of 1921. The Interstate Oil Compact of 1935 was the next advance in the use of compacts. This is a non-regional (nationwide) compact that now includes all the states producing a significant amount of oil. This compact "marked the use of the compact device as a means of establishing formal integrating and recommendatory machinery for state regulation in a field of economic production." (Zimmerman p. 7.) In 1939, the Ohio River Valley Water Sanitation Compact, (ratified in 1940 by Congress but not effective until Virginia's entry in 1948) was the first use in a wide region of a compact in the field of pollution abatement. It established common regulatory machinery of a limited character. In 1961, in the Delaware River Basin Compact the United States for the first time became a full party to a compact.

It is my opinion that as legal institutions interstate compacts have evolved to a point where they could be used to successfully effect energy and environmental goals by interstate and interstate-federal cooperation and coordination. Whether they are a politically workable solution is more problematical.

(3). Review of certain regional compacts:

There is a paucity of compacts designed to coordinate interstate regional regulatory activity of the kind that is directly pertinent to the electrical generating facility siting problem addressed in this study. Nonetheless certain regional compacts may be instructive as to the possibilities of the use of the compact device to solve that problem.

Colorado River Compact of 1921

Colorado River Compact is the most ancient of the modern compacts. Numerous federal projects accomplishing new or supplemental water uses in the Southwest have relied on the Colorado River Compact. Apparently the desire of California Edison Power Company for new sources of electrical energy coupled with a desire by southwestern farmers for further irrigation sources led to joint pressure to dam up Boulder Canyon. Upper basin states of the Colorado River: Colorado, New Mexico, Utah and Wyoming objected because under western water law he that first develops gets prior right to the water, the lower basin states where the dam would be located would get most of the water. So some prior allocation of water protecting upper basin users had to be agreed to.

> "Negotiations were therefore undertaken at Sante Fe, New Mexico, looking toward a division of water among the basin states. When the delegates from the states were unable to agree upon a specific amount of water for each state, they decided to divide the basin for allocation purposes into two groups of states: Colorado, Utah, New Mexico, and Wyoming were designated as upper basin states; Arizona, Nevada, and California were designated as Lower Basin States. It was then possible to appropriate the 'beneficial consumptive use' of water between the basins: 8.5 million acre-feet annually was allotted to the Upper Basin, 7.5 acre-feet annually to the Lower Basin.

This formula was written into an interstate compact intended for adherence by the seven states, and the compact document was signed by the delegates of all seven states on November 24, 1922.

"Although the state of Arizona did not ratify the Colorado River Compact until 1943, the division of water between the upper and lower basins allowed the Boulder Dam project to be carried out. Congress in 1928 passed the Boulder Canyon Project Act. This federal statute provided for flood control on the lower Colorado River, storage of water for irrigation, construction of the All-American Canal, and a government-constructed power plant. Taking cognizance of the fact that Arizona had not joined the Colorado River Compact of 1922, the statute provided that six-state ratification of the compact was sufficient to go forward with construction of the Boulder Canyon Dam. The statute required that California be among the six states ratifying the compact and that she enact a self-limitation law in conformity with a formula for water allocation among the Lower Basin States embodied in the statute. This formula was in the form of an authorization in the Boulder Canyon Project Act to the states of Arizona, California, and Nevada to enter into an interstate agreement to the effect that, of the 7.5 million acre-feet of water per annum allotted to the Lower Basin by the Colorado River Compact of 1922, 0.3 million acre-feet would be apportioned to Nevada and 2.8 million acre-feet to Arizona, in both states 'for exclusive consumptive use in perpetuity'.

"This water allocation formula was intended to encourage the states to settle water use rights to allow the Bureau of Reclamation to carry our its plans for further development of the water resources of the basin. However, the three states were unable to agree upon this or any other formula . . . . The failure of the states to apportion the water among themselves was an important factor in Congress' refusal to authorize further development projects in the basin. In 1951 the House Committee on Interior and Insular Affairs adopted a resolution deferring further consideration of all central Arizona project proposals 'until such time as use of the water in the lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the waters is reached by the states . . . .'

"The water allocation controversy was finally adjudicated by the U.S. Supreme Court. The suit was brought by Arizona in 1953 after California had made diversions from the Colorado in excess of the 4.4 acre-feet per annum limitation imposed upon herself as a condition to implementation of the Boulder Canyon Project Act of 1928. After extensive study by a Special Master and rehearing by the Supreme Court, the Court on June 3, 1963, announced its decision in Arizona v. California. The allocation formula sanctioned by the Court was essentially the same as that stipulated thirty-five years earlier in the Boulder Canyon Project Act: Arizona was granted 2.8 million acre-feet of water per annum, California 4.4 million, and Nevada 0.3 million.

> "In the Upper Basin of the Colorado, development for 'beneficial consumptive use' of the 8.5 million acre-feet of water per annum allocated to the up-stream states by the Colorado River Compact of 1922 was also delayed until the states divided the use of this water among themselves. A Bureau of Reclamation document released in 1946 inventoried potential projects for water resource development in the Upper Basin but stated that the available water supply was insufficient to permit construction of all of these projects. This led to the issuance of directives by the Commissioner of Reclamation, Secretary of Interior, and Director of the Bureau of the Budget that no new major projects on the Colorado River would be approved for construction by the Bureau of Reclamation until the states apportioned the water among themselves.
>
> "Construction of dams on the mainstream of the Colorado River within the Upper Basin was necessary to permit the Upper Basin to make consumptive use of the water allotted to it by the Colorado River Compact of 1922. The storage reservoirs were required to regulate the erratic stream flows and hold the water in the up-stream states until used by irrigators and other interests. Because of this, the four states responded to the call by federal officials for settlement of the water allocation problem by sending delegates to Cheyenne, Wyoming, in July, 1946, to negotiate the issue. On October 11, 1948, after eight meetings and fifty sessions of the delegates, a Colorado River Basin Compact incorporating a water allocation formula was signed by the delegates of Colorado, New Mexico, Utah, Wyoming, and Arizona." (Barton, supra, at 98.)

The legislative history of the Colorado River Basin demonstrates the difficulties of getting interstate agreement on matters of great importance to the disputing states and that the Compact although useful was no panacea. But the original compact was really not a modern compact. It had no administrative body and no ongoing dispute-settling or policy-making function. The compact was the settlement of a dispute or so it was thought. But it left too many other disagreements unresolved and set up no internal machinery for their resolution. Moreover, the matters in dispute were not amenable to a static solution, their dynamic nature demanded a dynamic compact.

Therefore, the legislatures of the five upper basin states met during the winter of 1949 and early in 1950 each state ratified the new compact.

> "The [upper] Colorado River Basin Compact of 1949 goes further than the 1922 Compact in that it establishes a permanent interstate agency, the Upper Colorado Basin Commission, consisting of one member from each of the compacting states. The compact directs the Commission to determine compliance of the states with the water allocation formula contained in the compact to undertake actions 'necessary, proper or convenient in the performance of its duties.'
>
> "The Upper Colorado Basin Commission's Eleventh Annual Report summarizes the agency's lobbying activities since enactment of the Colorado River Storage Project Act:
>
> 'The Commission has continued to cooperate with members of the Congressional Delegations from the Upper Colorado Basin States

> and with officials of the Department of the Interior and the Bureau of Reclamation in seeking appropriations of funds by the Congress for the construction of the storage units and participating projects authorized for construction in [the Act], as well as funds for [the] investigation of additional participating projects that are given priority in planning in the Colorado River Storage Project Act. As part of this cooperation, the Commission's Engineer-Secretary has been stationed in Washington, D.C., at intermittent periods acting as liaison between the Congress and States and various departments of government, supplying information, arranging and taking part in Congressional hearings, and providing other assistance requested.' (Barton, supra, at 100.)

As can be seen from the above, the new commission had no policy or true planning function. It had machinery to enforce the agreed on allocation settlement and to lobby Congress and federal agencies on behalf of its client states. Policy making and planning (if any) was still left to Congress, federal agencies and the individual states, in that order. In short even this new compact was only the settlement of a dispute and a mechanism for encouraging and facilitating cooperation between the states and between the states and the federal government. In itself, it was not a coordinating mechanism.

Interstate Oil Compact of 1935

The Interstate Oil Compact of 1935 was the result of the concerted efforts of the oil industry to avoid federal regulation of the oil or gas industries. (Barton) In fact control of the oil industry had been supported by the Roosevelt Administration but had failed, by a close margin, to receive oil industry approval and later, Congressional approval.

The stated purpose of this compact (I.O.C.) is to "conserve oil and gas by the prevention of physical waste thereof from any cause." It was not designed, in any way, to limit production or fix the price of oil and gas. Although the Compact was approved by Congress initially in 1935 and has been renewed every two years, "the Compact Commission has never acted to any significant extent independently of the oil industry." (Barton at 12.) It has little power and may not be a Compact needing Congressional consent. See below. Barton points out at p. 19-21, that the oil industry is effected by policy decisions of many federal departments, including the Justice and State departments and therefore the IOC is probably not detrimental to private consumers. And perhaps the benefits to the oil industry, such as continuing surveys of state and national governmental undertakings related to gas and oil maintenance of oil depletion allowances and acquisition of oil and gas leases on public lands at low costs have benefited the consumer as well.

This compact may not have needed Congressional approval. See U.S. Steel v. Multistate Tax Comm., 434 U.S. 452, 471-72, n.24 (1978).

Port of New York Authority Compact

Port of New York Authority Compact of 1921 established the Port of New York Authority with extensive powers. It is the first such agency.

> "In addition to construction and operation of physical facilities, the Port Authority performs planning and recommendatory activities to protect and advance the economic position of the Port of New York vis-a-vis other United States and foreign ports. Since its inception, the compact agency has conducted a continuing survey of the rates, regulations, and practices of all modes of transportation affecting the Port of New York. On the basis of this information and often in alliance with other public and private groups and individuals, the Authority recommends action designed to benefit the port area to legislative, administrative, and judicial officials at national, state, and local levels of government in the United States . . . ." (Barton, p. 67)

This Authority has a long and distinguished history but has not been without its critics and has been the center of considerable controversy. See Tobin v. United States, 306 F.2d 270 (2nd Cir. 1962). Because of its great power and long life this Compact deserves careful consideration.

Ohio River Valley Water Sanitation Compact

Ohio River Basin Compact or the Ohio River Valley Water Sanitation Compact of 1940 is probably the most important single compact to be studied. It is regional, has administrative machinery with policy and planning function and is located in the ORBES area. In fact its relationship to ORBES may be more than as a model but may be directly implicated in any interstate arrangements made to coordinate future electric power plant location decisions in the Ohio River Basin. This Compact actually came to life in June 30, 1948 when Pennsylvania and Virginia finally joined.

> ". . . The compact creates the Ohio River Valley Water Sanitation Commission, composed of three members from each signatory state, and directs the Commission to promote pollution abatement within the area 'which shall embrace all territory within the signatory states, the waters in which flow ultimately into the Ohio River or its tributaries'. The compact charges the Commission to plan and advise the states of action needed to combat pollution, and Article IX of the compact empowers the interstate agency to enforce its own standards of water purity through any court of general jurisdiction within the compacting states.
>
> "In formulating these standards, the Commission followed the customary procedures for administrative rule-making. The agency gave notice that a public hearing would be held for a particular stretch of the river. At the hearing, persons designated by the Commission would hear testimony of interested parties. When standards of water quality were finally arrived at, the Commission would approve and publish the same. In these determinations, as well as other matters, the interstate agency has sought the advice of several 'industry-action and advisory committees' . . . .
>
> "Concerning enforcement measures, although the compact empowers the Commission to issue to negligent polluters orders for compliance with its standards and to enforce such orders in the courts, the interstate agency has always tended to leave enforcement to the regulatory agencies of the compacting states . . . ." (Barton, pp. 36-38)

According to Barton this Commission has "made a significant contribution to [the] program of water pollution control." (at 41) "Through its administration of federal funds and public relations activities, the Commission has acquired some power to force action on pollution by municipalities." (Id. at 41.) However, according to Barton (writing remember in 1967) the "Sanitation Commission power to force pollution abatement by industry is virtually nil." (Id. at 42.) This Compact will be the focus of much further study for this project both as a potential model and its direct implications. (Pertinent parts of it are printed in the next section, "B. The Use of an Existing Compact".)

This Compact also led to a most significant explication by the Supreme Court of the Compact Clause, in West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951). The state auditor refused to pay the West Virginia contribution to running the Commission, which had been authorized by the legislature in 1949 (when the Commission actually got started). The West Virginia Supreme Court upheld this refusal declaring the West Virginia approval of the Compact some ten years before as inconsistent with the state constitution because it authorized a delegation of legislative power to non-West Virginia authorities. The decision was based on the implications of the constitution, not express language. The United States Supreme Court took the extraordinary step of reinterpreting the W. Va. constitution and declared it did not bar West Virginia's joining the Compact.

Two Federal-Interstate Compacts

The Delaware River Basin Compact and the Susquehanna River Basin Compact are the first compacts in which the federal government has played an active, ongoing role as participant.

> "The Delaware River Basin Compact creates a permanent agency, the Delaware River Basin Commission, composed of five members: the governor of each compacting state and a representative of the President of the United States. The compact lodges in the Commission an impressive array of planning and operating responsibilities. The intergovernmental agency is directed by the compact to formulate and keep current a comprehensive plan for the development of the basin's water resources. In conformity with such a plan, the agency is empowered to plan, construct, operate, and maintain dams, reservoirs, and other facilities. It is authorized to conduct programs for flood control, water quality improvement, hydroelectric power generation, fish and wildlife conservation, recreation, forestation, and watershed management. The Commission is also authorized to make future allocations of the waters of the basin among the four states signatory to the compact.
>
> "The Commission is authorized by the compact to adopt and recommend to the signatory states and national government an annual expense budget, including capital funds for projects of the Commission which may be authorized by statutes of the signatory parties. The compact agency is empowered to borrow through tax-exempt bond issues on the credit of the Commission. The compact withholds from the Commission on the power to tax or to pledge the credit of the national government or the states behind its financial obligations." (Barton, pp. 107-108)

(4). Review of the literature on interstate compacts:

The literature on interstate compacts is not vast. Here is a summary of the more important studies which for convenience is listed alphabetically by authors with "Books" first, followed by "Articles" from legal periodicals.

Books

Barton, The Interstate Compact in the Political Process (1967) is a study focusing on some dozen compacts for somewhat extended study (3-5 pages) and another dozen for lessor study. The author declares that "the study emphasizes political, rather than legal and structural aspects of the compact device." "I have attempted to relate each compact or compact agency to the broader framework of policy of which the compact is a part. The compacts are analyzed in terms of the contribution to intergovernmental cooperation (including nation-state as well as interstate relations) and their utility for promoting all interests of the public in the problems over which they have jurisdiction." (p. 6) Although giving credit to the studied compacts for some significant achievements, Barton is somewhat sceptical of their use, viewing them as devices by which private enterprise groups prevent more effective governmental regulation at the federal level.

Great Lakes Basin Compact, Hearings before the Committee on Foreign Affairs of the House of Representatives (1966) contains arguments for and against Congressional approval of the already extant compact (1955).

Leach and Sugg, The Administration of Interstate Compacts (1959) takes a very optimistic view of the potential role of interstate compacts to serve interstate governmental needs.

Ridgway, Interstate Compacts: A Question of Federalism (1971)

Thursby, Interstate Cooperation, A Study of the Interstate Compacts (1963) is a general discussion of the nature of compacts, their enforceability and potential uses. It is exhaustively footnoted and although it contains no bibliography, the footnotes serve as a reference to the rather vast literature on compacts from the 1930s and 1940s.

Zimmerman and Wendell, The Interstate Compact since 1925 (1951) is self-consciously a successor to the Frankfurter and Landis study and is quite excellent but alas is now itself dated though still useful. It is a general survey including extended discussion of creation and enforcement of, and federal participation in compacts.

Zimmerman and Wendell, The Law and Use of Interstate Compacts (1961) is an update of the 1951 study.

Zimmerman and Wendell, The Law and Use of Interstate Compacts (1976). The Council of State Governments republished the 1961 study supplemented by a number of recent articles by the authors printed as an Appendix. Also as an Appendix (pp. 57-88) are "materials intended as aids in the drafting of interstate compacts. They contain the texts of clauses gathered from a wide variety of existing and proposed compacts together with some other statutory provisions. These clauses have been arranged according to subject matter and are accompanied by interpretive comments." Wendell and Zimmerman are political scientists.

Articles

Abel, *Ohio Valley Panorama*, 54 W. Va. L. Rev. 188 (1952), is a fairly exhaustive explication of the landmark case on interstate compacts, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

Abel, *Interstate Cooperation as a Child*, 32 Iowa L. Rev. 203 (1947). Cited in *U.S. Steel Corp. v. Multistate Tax Comm.*, 434 U.S. 452, 465, n.16 (1979). It traces the development of the use of the compact device to effect interstate cooperation and the encouragement given such device by courts.

Bloom, *The Effect of Interstate Water Quality Controls on Legal and Institutional Water Allocation Mechanisms--Can the Environmental Protection Agency Amend an Interstate Compact?* 22 Rk. Mt. M. L. Inst. 917 (1976) a short (22 pages) article on the possible legal effect and conflict between the Colorado River Compact and federal environmental laws especially the Federal Water Pollution Control Amendments of 1972. The author concludes that the Congress possesses the power to "override" provisions of a compact to which it had previously assented but that the Supreme Court will be reluctant to find the Congressional intent to do so unless clearly expressed or clearly necessary to give effect to the national legislation. (p. 933) Bloom found no such intent in the case under scrutiny.

Cellar, *Congress, Compacts, and Interstate Authorities*, 26 Law and Contemp. Prob. 682 (1961) on the supervisory role of Congress in Interstate Compacts.

Comment, *Federal Question Jurisdiction to Interpret Interstate Compacts*, 64 Georgetown L.J. 87 (1975) is a fairly lengthy discussion of League to *Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 Fed. 517 (9th Cir. 1974), *cert. denied* 420 U.S. 974 (1975). The article concludes ". . . even if the courts do not equate an interstate compact with federal law, they should accept federal question jurisdiction over claims arising under the compact based on the need to develop federal common law either where two states are in direct conflict or where the compact concerns an area in which extensive federal regulation already exists." (At 111.)

Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact*, 64 Mich. L. Rev. 63 (1965). Discussion as to when an interstate accord becomes a "compact or agreement" requiring Congressional consent. Cited several times in *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452, 462, 465, and 482 (dissenting) (1979).

Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 Va. L. Rev. 987 (1965) a long, closely reasoned article which concludes:

> "The jurisdictional base currently employed by the Supreme Court--the law of the Union doctrine--is so manifestly indefensible that no other court and no commentator has ever taken seriously the suggestion that the Supreme Court actually espouses it. It has been the purpose of this Article, first to demonstrate that the Court does indeed espouse that doctrine and second, to collect

enough arguments against that doctrine to make its continued use unjustified. An equally important purpose has been to show that, whatever doctrine is invoked to support certiorari, its affects on other aspects of compact law must be weighed. Once the law of the Union doctrine is discarded, the way will be open for creative legal analysis to characterize the interstate compact in a manner which not only will support certiorari, if that is desired, but also will make possible the development of other aspects of compact law in such fashion as to maximize the potential of the compact device as an instrument of American government." (at 1048-49)

Frankfurter and Landis, The Compact Clause of the Constitution--A Study in Interstate Adjustments, 34 Yale L.J. 685 (1925) is the most cited article in the area. Written by two of the most respected public law scholars of the era, this article gave impetus to the trend of using compacts to solve interstate problems. Exhaustively researched it contains in an appendix "a detailed catalogue of the compacts to which Congress has given its sanction, the action of the State legislatures in negotiating, ratifying and enforcing agreements, the administration of agencies created by compacts, and adjudications involving them. In addition, the appendix contains an enumeration of agreements which became operative without Congressional consent and litigation under them, proposals for agreements (which failed)" (p. 695). The authors discovered eight fields of legislation that have elicited application of the Commerce Clause three of which are relevant to this study: "(4) uniformity of legislation," "(6) conservation of nature resources," "(7) utility regulation." Because the authors' major concern is electric utilities I quoted it at some length as a sort of preface to the two sections on interstate compacts.

Grad, Federal State Compact: A New Experiment in Co-operative Federalism, 63 Col. L. Rev. 825 (1963) explores some of the developments leading to the conclusion of the Delaware River Basin Compact (1961), the first interstate compact with full federal participation and examines the needs filled by the then unique device, the questions it raises, and its potential application for the future.

Note, Congress and the Port of New York Authority, 70 Yale L.J. 812 (1961).

Reisman & Simson, Interstate Agreements in the American Federal System, 27 Rutgers L. Rev. 70 (1973). "In this article, an attempt is made to provide a more comprehensive (than mere compacts) view of the place of interstate agreements in the American federal system. By reference to statutes, case law, uniform laws and interstate compacts and organizational activity, the authors survey a broad range of functional collaborations and agreements of varying degrees of formality." Written at a high level of generalization using Myers McDougal's seven component functions of a decision to analyze the various modes of interstate co-operation, the article is difficult but useful.

Tribe, Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv. L. Rev. 682 (1976) is quoted by the Supreme Court in U.S. Steel v. Multistate Tax Comm., 434 U.S. 452, 469, n.21 (1978). Tribe is a leading constitutional scholar, often cited by courts and other commentators. He concludes this brief essay: "The central mission of courts in deciding issues involving the distribution of federal power should therefore be to protect Congress' role from both state and executive intrusions." (at 713)

B. The Legal Status of Compacts:

By "legal status" is meant a compact's status as creating rights and duties in people and entities (legally organized groups of people, public and private) enforceable through some compulsory process. The nature and extent of these rights and duties depend primarily on the wording of the particular compact. Which "people and entities" have rights and duties will also vary widely. By definition a right in one creates a correlative duty in another. The "entity" could be a state, qua state, an agency of the central government of the state, a local government, its agents, a compact commission or its agents, a private corporation, lobby groups, labor unions, partnerships and so on. The "compulsory process" means a procedure for imposing a "sanction" as that term is defined in the glossary of this study.

Although legal generalizations are probabilistic (one is predicting what a sanctioning agent might do), some generalizations can be made about the potential legal status of compacts based on past judicial judgments in compact litigation.

(1). Jurisdiction of courts:

The first set of generalizations concerns jurisdiction: who gets to impose the sanctions? Generally our society depends on the established courts of the federal government or state governments to impose coercive sanctions but compacts have a quasi-international law status so perhaps a special forum or court could be used. There are, of course, two kinds of established courts, federal and state, but it will not suffice to generalize about either federal jurisdiction or state jurisdiction in the generic. The federal jurisdictions pertinent here include exclusive original jurisdiction in the Supreme Court, original jurisdiction in the Supreme Court concurrent with United States District Court jurisdiction, exclusive original District Court jurisdiction, removal jurisdiction from state court to United States District Court, administrative appeal jurisdiction in District Courts and in the United States Circuit Courts of Appeals and appellate and writ of certiorari jurisdiction in the Supreme Court from both state courts and lower federal courts. State court jurisdiction is similarly complex but perhaps less so.

This detailing of jurisdictions is necessary to make clear the potential complexity of jurisdictional problems. Congress by specific statute defines the various jurisdictions of the federal courts within certain constitutional limitations. These generalizations concerning federal jurisdiction in relation to compacts can be made:

(a) The United States Supreme Court has exclusive original jurisdiction of disputes between two or more states whether for the enforcement of a compact or not. 28 U.S.C. § 1251(a)(d).

(b) The United States Supreme Court has assumed certiorari jurisdiction from state court compact disputes in two cases: West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) and Delaware River Joint Toll Bridge Comm. v. Colburn, 310 U.S. 419 (1940) (hereafter Colburn).

Four theories have been used to explain this assumption of jurisdiction:

First is the simple idea that a compact consented to by Congress becomes a "law of the Union". Pennsylvania v. Wheeling and Belmont Bridge Co., 54 U.S.

(13 How.) 518 (1851).

Second is the more complex notion that the interpretation of a compact, including its validity and binding effect, is a federal question requiring an independent federal judgment based on standards inferred from the federal constitutional scheme, i.e., the rules of compact interpretation are a species of "federal common law". West Virginia ex rel. Dyer v. Sims, supra, at 28. See, Friendly, In Praise of Erie--And of the New Federal Common Law, 39 N.Y.U.L. Rev. 383 (1964); Monaghan, Forward: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975); McLaughlin, Territorial Due Process: Analysis of an Emergent Doctrine, 81 W. Va. L. Rev. 355, 388 (1979).

Third is an alternative theory of "federal common law".* This theory holds that many compact disputes involve a subject matter that ought to be controlled by federal law because of its interstate nature regardless of whether or not there is a compact. This argument was made to the Colburn court (see, Engdahl, Construction of Interstate Compacts: A Questionable Federal Question, 51 Va. L. Rev. 987, 1009 (1965)) relying on Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 92 (1938) where Brandeis, J., for an unanimous court just two years before Colburn, had rejected the "law of the Union" thesis and based jurisdiction on the need to apply the "federal common law" inferred from the judicial resolution of disputes as to rights to water in interstate streams. The species of federal common law thus inferred is not different from that which is inferred from cases concerning boundaries between states which also raise federal questions. Cf. Wedding v. Meyler, 192 U.S. 573 (1904). In spite of this argument made from the then recent Hinderlider Case, his basis was not mentioned in Colburn. This seems surprising in view the fact that Colburn involved the liability of an agency created to build bridges over a navigable stream. This theory of jurisdiction was not available in Sims, however. Although the compact in Sims involved an interstate stream (the Ohio River) the dispute pertained only to the validity and binding effect of the compact and not with its meaning with regard to the stream.

Both rationales "two" and "three" above rely on federal common law but the authority to create such law is inferred from different parts of the constitution, the first related directly to compacts (i.e., the authority to settle disputes between states found in Art. III, § 2, and the authority to enter into compacts found in the Compact Clause), the second related to other powers in the constitution (e.g., Commerce Clause).

A fourth basis not mentioned in either case but probably available in West Virginia ex rel. Dyer v. Sims, is the Contract Clause, ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Art. I, § 10 (cl. 1), U.S. Const.). A "compact" is a "contract" within the meaning of that clause. Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); see, Thursby, Interstate Cooperation, 38-40, 43, 51 (1953).

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*If a case raises federal common law issues then it apparently satisfies the language "right . . . under the constitution" in 28 U.S.C. § 1257(3) giving writ of certiorari jurisdiction to the Supreme Court from a state's highest court.

Other specific provisions of the constitution could likewise give jurisdiction if the compact or the agency operating under it violates those provisions. That was the claim in Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 99 S.Ct. 1171 (1979) where an action against the compact agency (TRPA) for conduct "under color of state law" within the Civil Right Act (42 U.S.C. § 1983) was held to give a district court jurisdiction under 28 U.S.C. § 1343(3). In that case, the Court declared: "The Compact had its genesis in the action of the compacting States, and it remains part of the statutory law of both states." (Id. at 1176.) Therefore the agency was acting under color of state law. The Court noted that although the Lake Tahoe Compact was approved by Congress federal involvement is "limited by the Compact to the appointment of one nonvoting member". (Id.) Moreover, under the terms of the compact the States could confer additional powers and duties on TRPA without further congressional action and each state could withdraw at will. (Id.) TRPA was also held to be an interstate but local governmental agency not having Eleventh Amendment sovereign immunity from federal suit that the state central government would have:

> "If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be held to immunize such an entity. Unless . . . the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into [the Eleventh] Amendment." (Id. at 1177.)

Both California and Nevada filed briefs claiming it was a "political subdivision" not "an arm of the state". (Id.) The Court took the compacting states at their word. "Under the terms of the Compact, six of the 10 governing members of TRPA are appointed by counties and cities, and only four by the two states." (Id.) Funding is provided by the counties. (Id. at 1178.) Finally the compact said that obligations of TRPA shall not be binding on either State. (Id.)

This case is the most recent discussion by the Supreme Court of the legal status of compacts. Although it must be kept in mind that the Court's discussion is made in the context of deciding a particular dispute about a particular compact and extrapolations to other contexts must be done with caution, some tentative inferences as to the Court's general attitude toward compacts can be made.

The Supreme Court suggests that a Compact is state law unless there is considerably more federal involvement than mere assent. How much more is not stated, but the quoted rationale, that it had "its genesis in the action of the compacting states", undercuts the "law of the Union" thesis which was the basis of jurisdiction stated by the United States Court of Appeals for the Ninth Circuit in League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1974) cert. denied 420 U.S. 974 (1975). Moreover, if we accept Engdahl's interpretation of the Colburn decision (see above) that the Court there declared that Congressional consent perforce makes the Compact the "law of the Union", then this recent case disapproves of Colburn.

At first glance, Lake Country Estates Inc. v. Tahoe Regional Planning Agency, likewise seems to make dubious the proposition in Petty v. Tennessee-Missouri

Bridge Comm., 359 U.S. 275-278 (1959): "The construction of a compact sanctioned by Congress . . . presents a federal question". However, a distinction must be made between the construction of a compact and the compact itself. Petty and Dyer v. Sims hold only that the construction of a compact is a federal question. In other words the policy and rules (inferred from the policy) used to determine the meaning of a Compact are federal policy and rules. (Since it is judicially fashioned it is called "federal common law".) (Actually Colburn also says "construction of a compact" is a federal question.) Using federal law for construction does not convert the thing being construed, the compact, into federal law any more than a contract becomes "law" because "law" is used to construe it. But the enforcement of rights and duties under a compact always requires interpretation of the compact. This therefore seems to be a distinction without a difference. But the construction of the compact that creates a federal issue and therefore requires federal common law to resolve it is a construction resolving a dispute between the compacting parties as to their rights and duties inter se. That is the basis of Frankfurter's finding of jurisdiction in West Virginia ex rel. Dyer v. Sims, supra. See also his dissenting opinion in Petty v. Tennessee-Missouri Bridge Co., supra, at 283-89. But Sims was not on its face a dispute between states. But underlying West Virginia's attempt unilaterally to withdraw from ORSANCO was a fight between the states as to whether each was irrevocably bound to the others in the common enterprise. Only in its formal judicial posture was it a dispute between West Virginia officials, some wanting to stay in, the others to get out. The other states in ORSANCO appeared and made arguments to the Supreme Court as amicas curia, so called "friends of the court"—people who have an interest in the litigation but are not officially parties to it. Colburn and Petty cannot be similarly explained. In fact Petty relies on the "law of the Union" thesis to interpret a compact directly contrary to the compacting parties intent--partys' intent being the usual rule for contract or compact construction. See Lake Country Estates Inc. v. Tahoe Regional Planning Comm., supra.

Although the question is hardly free from doubt, Lake Country Estates Case does seem to undermine the "law of the Union" rationale. Therefore League to Save Lake Tahoe v. Tahoe Regional Planning Agency was wrongly decided by the Ninth Circuit. As the Supreme Court has said many times the fact that a writ of certiorari was denied implies nothing about the Court's attitude toward the merits. In League to Save Lake Tahoe, the League and the Sierra Club sought injunctive action against TRPA alleging that the Agency had failed to adopt a "regional plan" within the meaning of the Compact, to set forth ordinances that effectuate the regional plan, and to prepare an environmental information statement. The United States District Court dismissed for lack of jurisdiction. The United States Court of Appeals for the Ninth Circuit reversed as noted above. There was no dispute between the states. It was simply some private citizens who did not like the way in which the agency was being run. It is a kind of government by lawsuit. But the Ninth Circuit decision was an aberration. See, Comment, Federal Question Jurisdiction to Interpret Interstate Compacts, 64 Georgetown L. Rev. 87 (1975). Which brings us to the next proposition.

(c) Federal District Courts do not have federal question jurisdiction to hear claims by people other than the party states against compact agencies whether for tort liability or other liability of the agency or to enforce the compact. See id. at 88 and no. 6; T. Ernst, Legal Problems Affecting Interstate Transportation Agencies, 11 Valparaiso Law Review 351 (1977). This is partly because of the requirement that the federal issue be raised in the complaint and crucial to, or central to establishing the claim for relief. It may not "hover" in the background like Congressional consent to states to tax national banks "hovered" in Gully v. First Nat'l Bank, 299 U.S. 109 (1936), where such "hovering" was found not to be a predicate for federal jurisdiction. Except for League to Save Lake Tahoe v. Tahoe Regional Planning Agency, supra, the courts have uniformly so held and this seems consistent with the Supreme Court's opinion in Lake Country Estates Inc. v. Tahoe Regional Planning Agency. See for example Yancoskie v. Delaware River Port Authority, 528 F.2d 722 (3rd Cir. 1975) and Adams v. Cuyler, 592 F.2d 720 (3rd Cir. 1979). Of course, if agency action violates rights, other than compact rights, created by federal law, such as rights protected by the Civil Rights Act, there is jurisdiction.

(d) In 1962 Congress granted federal district courts concurrent jurisdiction with the Supreme Courts in cases involving:

(1) construction or application of any interstate compact;
(2) relating to pollution of interstate rivers;
(3) where a party state is a plaintiff.

33 U.S.C. § 466q-1 (1970).

(e) The agency and its personnel are probably subject to suit for their torts, etc., in state court unless the Compact otherwise expressly provides.

(f) Much of the jurisdictional uncertainty can be avoided for a particular compact by specific provisions within the compact.

(2). Nature of the legal rights and duties created by compacts:

Rights and duties connote relationships between parties (people and entities) enforceable by some governmental sanction. Every "right" in one has a correlative "duty" in another. The law of torts and private contracts concerns the rights and duties between private citizens, although occasionally, within the rapidly eroding doctrine of sovereign immunity, governmental entities also have such rights and duties. Constitutional rights in their most usual connotation are the rights of private citizens or entities, rights against government and creating correlative constitutional duties in government. There is a vast area of constitutional law, however, that creates rights and duties between individual states and the federal government. There is a lesser area of constitutional law that creates rights and duties between states. This primarily involves the Full Faith and Credit Clause. Compact rights are of this nature, also.

Thus to begin with, an interstate compact creates rights and duties between states. Insofar as it creates rights and duties between states, compact rights are federal--meaning they are not controlled by state law. This is probably true even if the compact is not one either consented to or required to be consented to by Congress. If a dispute should arise as to rights and duties between states then the United States Supreme Court would have exclusive original jurisdiction (27 U.S.C. § 1251(a)(1)) and in such disputes the Court always applies federal common law, that is, federal judge made or "discovered" law. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951).

The primary aim of such federal common law of interstate compacts is to discover the true intent of the parties to the compact; first through the words of the compact, then through practices built up under the compact-in-action and finally by examining the history and background of the negotiations of the compact. In other words care is taken to enforce the will of the contracting parties inter se. See Frankfurter, J.'s, dissenting opinion in Petty v. Tennessee-Missouri Bridge Comm., infra at 285.

This discovery of the will of the parties can become somewhat muddled by the Congressional consent as it was in Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 275 (1959) (discussed in the previous section) where the Court "discovered" that the Congressional consent to "a sue and be sued" clause implied a waiver of Eleventh Amendment sovereign immunity, in the face of a clear showing that the contracting states did not intend such a clause to be a waiver.

Incidentally, Petty was not a dispute between states, but a suit by a private party (a compact commission employee killed at work) against the compact commission for negligence. The rights and duties that created the lawsuit in Petty, were between a private party and the compact agency. These are not compact rights, but general rights and duties that obtain between citizens and agents of government. The compact may attempt to control those rights and duties. The purpose and powers of the compact agency determines the governmental nature of the compact. In Lake Country Estates Inc. v. Tahoe Reg. Planning Agency, 99 S.Ct. 1171 (1979), the agency was determined to be a "local governmental agency" without Eleventh Amendment immunity and it was "acting under color of state law" within the meaning of the federal Civil Rights Act, 42 U.S.C. § 1983. However, it seems entirely possible that a compact, whatever its purpose or power, that purported to affect a region covering a large part of several states would not be "local government" and its personnel would not be acting "under color of state law". (The Lake Tahoe region covers a mere 500 square miles.) In this sense, The Ohio River Valley Sanitation Commission (ORSANCO), for example, is surely distinguishable from the Tahoe Regional Planning Agency (TRPA). It is distinguishable in other particulars also. As Dyer v. Sims, supra, made clear states may not unilaterally withdraw from ORSANCO. They could from TRPA. The federal government is a voting participant in ORSANCO but has only one non-voting member in TRPA. They are similar in that additional powers and duties can be conferred on them by the party states without further consent.

However, even if an ORSANCO-like compact commission could not be sued under 42 U.S.C. § 1983, it might be subject to suit for violation of civil rights under 28 U.S.C. § 1331 (general federal question jurisdiction). The Court would probably ultimately hold that compact agents are either federal officers or state officers and enjoy no more immunity from lawsuit for federal civil rights violations than any other governmental official state or federal. It is clear from the Lake Tahoe decision, however, that insofar as the agency is performing legislative acts it is absolutely immune from lawsuit, (at 1179) in federal court. In Lake Tahoe Estates, Inc., the Court said: "This reasoning is equally applicable to federal, state and regional legislators. Whatever potential damage liability regional legislators may face as a matter of state law, we hold that petitioners' federal claims do not encompass the recovery of damages from the members of TRPA acting in a legislative capacity".

A compact agency designed to do merely coordinative tasks is not likely to be legislating in such a way as to create concern as to the violation of the constitutional rights of individuals against government. Any legislating that a coordinative agency might do should only effect the rights and duties of party states inter se. Thus private party litigation is not as likely to throw a wrench into a merely coordinative scheme as it is to so "wrench" an interstate regulatory scheme.

However another recent case growing out of the Tahoe Region Planning Compact, a case referred to in the previous subsection, might cause some disquiet in this regard. In League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 Fed. 517 (9th Cir. 1974) cert. denied, 420 U.S. 974 (1975) the private party (an environmental group) was allowed standing and federal court jurisdiction to bring an injunctive and declaratory action not to vindicate constitutional rights or other civil rights violated by the agency but to check the exercise of agency discretion in adopting a regional plan. Plaintiff alleged that TRPA's adopted Plan would cause substantial environmental damage and therefore was not a "regional plan" within the meaning of the compact. Regardless of the ultimate outcome of such a suit, it can cause years of delay in implementing the compact. It is just such lawsuits that make regulatory schemes inefficient. If an interstate compact designed to coordinate state implementation of federal and state policy on a regional basis in order to avoid interstate conflict and the attendant delay and confusion, were in fact, to be another avenue of litigation, then much of its ability to promote efficient regulation would be lost. By careful wording designed to channel dispute resolution, and to make clear the compact's coordinative and non-regulatory character, such judicial disruption as in the League to Save Lake Tahoe Case, should be obviated. But it cannot be guaranteed. As long as the attitude typified by the following remark of the student editor of the article quoted briefly in the Review of the Literature subsection above[*] from the Georgetown Law Review prevails, then courts will interfere: (at 88-89) "The existence of [a multi-state administrative or regulatory] agency, in turn, often requires judicial supervision to ensure that the agency is carrying out its mandated duties." It is a matter of speculation as to whether the ultimate lawfulness oft imputed to courts is the reason for their ultimate authority on what is lawful or whether it is rather that their ultimate authority is the reason for their ultimate lawfulness. In absolute monarchies the King could do no wrong because what he did defined the right. In any event the former attitude reigns today.

Two last points: when the federal government is an actual party to a compact and not merely a consenting agency, then in interpreting the meaning of a compact it should be treated as a party when divining the collective will of the parties. Moreover, although unilateral acts of party states abrogating provisions of a compact or withdrawing from the compact are not lawful unless specifically provided for in the compact, Congress cannot be so bound. Although this has not happened so far as I know, if a later Congress should decide that an ongoing regional compact agency's function could be better handled by a purely federal agency then it could supersede the compact with federal law just as it can supersede federal law by later enactments.

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[*] Comment, Federal Question Jurisdiction to Interpret Interstate Compacts, 64 Geo. L.J. 87 (1975).

(3). Enforcement:

There are two kinds of enforcement involved with interstate compacts: enforcement of compact rights and duties between the parties and enforcement of compact agency decisions against third parties, private citizens and entities. In the latter situation the compact is regulatory in nature and generally provides for the use of member state courts by the compact agency. This is what ORSANCO provides. So far as I know no compact has ever attempted to set up its own independent system for sanctioned enforcement. Could it? Assuming it were politically feasible to get such agreement between states, it is doubtful that it would be legal. Sanctioned enforcement requires more than a judge, clerk and courtroom. It requires the other trappings of sovereignty including police and jails. Compacts cannot create such sovereigns. Moreover, Article III of the Constitution establishing and delineating federal judicial power would not allow it. A compact could, if Congress so authorized, allow for enforcement in federal courts. The Congressional grant of jurisdiction should be express, however.

The enforcement of a coordinative compact is much more likely to raise the first kind of problem mentioned above, enforcement between the member states. There are three possibilities here, beginning with the Supreme Court's exclusive original jurisdiction to settle "all controversies between two or more states". (28 U.S.C. § 1251(a)(1).) The exclusiveness of this original jurisdiction is a matter for Congressional discretion, although since the beginning of the Republic it has been exclusive. Nonetheless, Congress could make it non-exclusive as it has made jurisdiction to settle "all controversies between the United States and a State", and "all actions or proceedings by a State against the citizens of another State . . . ." (28 U.S.C. § 1251(b)(2) and (3).) Ames v. Kansas, 111 U.S. 449 (1884). Thus, Congress could consent to a Compact that specifically provides for alternative original jurisdiction in some lesser federal court or even a special ad hoc federal court for settlement of disputes between member states. Such Congressional consent, if clearly made as to the jurisdictional provision, would pro tanto change 28 U.S.C. § 1251(a)(1). If no such provision is made in the Compact or in the act giving Congressional consent then § 1251(a)(1) would control.

As to this option two further observations must be made. First, the case of Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) makes clear that if the provision for alternative jurisdiction is worded as § 1251(b) is worded ("The Supreme Court shall have original but not exclusive jurisdiction of . . .") then taking jurisdiction will be at the Court's election not the parties. Moreover, the Court in Wyandotte manifested great reluctance to exercise original jurisdiction where it can avoid it. Speaking for eight members of the Court, Justice Harlan stated:

> "This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of fact-finding and so forced, in original cases, awkwardly to play the role of fact-finder without actually presiding over the introduction of evidence. Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers."

It should be noticed however that such reluctance would probably be substantially lessened in bona fide dispute between two states. Harlan added:

> "Thus, at this stage we go no further than to hold that, as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attune with its other responsibilities." (Emphasis added.)

Moreover, the alternative jurisdiction language could make plain that the election of an original forum is for the disputing states (or more precisely the plaintiff state) and not the Court. Or the Compact (with express Congressional consent, of course) could specify certain disputes that might arise as exclusively for the Supreme Court and others only alternatively. Although the matter is not entirely free from doubt, it seems likely that the Supreme Court could not be stripped entirely of its original jurisdiction to settle a compact dispute between states. See Wright, Law of Federal Courts, 3rd ed. (1976) at 556.

In exercising such jurisdiction the Court is forced to "awkwardly to play the role of fact-finder without actually presiding over the introduction of evidence." (See quotation supra.) It does this by appointing a master who acts as an equity judge, hears all the testimony, prepares a finding of fact and a conclusion of law and along with a record of the testimony submits it to the Court.

The findings and conclusions of the master will in no way bind the Court. They are used merely as advice and guidance. Wright, supra, states:

> "Pleadings and motions in original actions are governed by the Federal Rules of Civil Procedure, and those rules are 'a guide' on other procedural questions that may arise, but the procedure remains not very well defined."

If the action calls merely for an interpretation of the words of a compact, or involves other purely legal questions, then appointment of a master is not required. In Wyandotte, Justice Douglas in dissent suggested an additional aid in complex cases: "We could also appoint--or authorize the Special Master to retain--a panel of scientific advisers."

The other two possibilities for enforcement end with the Supreme Court but don't start there. In West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) a kind of backdoor was found by one state official bringing an action in state court against another state official [the auditor] to force that official to pay from the state treasury the state's agreed to share of the cost of administering the compact. When the state Supreme Court upheld the auditor's claim that it was a violation of its state constitution to have joined the compact, the United States Supreme Court granted certiorari. The other states to the compact were not parties but were allowed to file an amicus curia brief since they were the real parties in interest. As Justice Frankfurter, later observed (in Petty v. Tennessee-Missouri Bridge Comm., supra, dissenting at 284): "[Dyer v. Sims] was a typical controversy among states, a controversy as to the undertaking of a compact among states, for the peaceful solution of which the Constitution designed Art. 3, § 2." It must be remembered that Art. 3, § 2, defines both the judicial power of the United States and the original jurisdiction of the Supreme Court. The judicial power extends inter alia, "to Controversies between two or more states". Original jurisdiction of the Supreme Court extends, inter alia, to "those [case] in which a state shall be a Party". In his explanation quoted above of the granting of certiorari so that the Court could exercise appellate jurisdiction in Dyer v. Sims, Frankfurter was referring to the judicial power aspect of Art. 3, § 2. This means that not all the constitutionally-granted judicial power over controversies between two or more states must be exercised in original actions in the Supreme Court. Although Engdahl in the article cited in previous discussion on jurisdiction suggests otherwise, certiorari jurisdiction to review state court decision where the real controversy is between states, regardless of the nominal parties, seems appropriate. Nonetheless, the highly unusual circumstances that gave rise to the Dyer v. Sims "backdoor" are unlikely to be repeated.

Finally, there is the possibility of using arbitration. Zimmerman and Wendell suggested in 1951 that: (see supra at 48):

> "Although judicial enforcement undoubtedly is a useful last resort, it is submitted that suits in the Supreme Court, as a means of securing performance of compact obligations, are too much emphasized. In the drawing of private contracts, the extent to which litigation can be forestalled or avoided generally is thought to be a yardstick of success. This is the reason why provisions calling for arbitration or liquidated damages are incorporated so often into private agreements. So far as your authors are aware, the first compact to contain language that may be regarded as an arbitration provision is the Snake River Compact of 1950. Article IV, C. (Of that Compact read:) 'In the case of failure of the administrative officials of the two states to agree on any matter necessary to the administration of this compact, the Director of the United States Geological Survey or whatever official succeeds to his duties, shall be asked to appoint a Federal representative to participate as to the matters of disagreement, and points of disagreement shall be decided by majority vote.'
>
> Article XIII of the old Pecos River Compact (1925) provided machinery for the adjustment of disputes arising under the agreement. But the proposed commissioners could only recommend solutions and could not make awards."

Ultimate coerced enforcement against a recalcitrant state of an arbitrators decision would still depend on the judiciary and ultimately the Supreme Court. Of such coerced enforcement Professor Charles Alan Wright says:

> "It is not clear how a judgment against a state would be enforced if a state were to prove recalcitrant. In the lengthy litigation between Virginia and West Virginia over 12 million dollars owed by the latter to the former, the Court at one point wrote a strong opinion saying that the judgment was enforceable but not deciding precisely how it might be enforced. (Virginia v. West Virginia, 246 U.S. 565 (1918) was the last of a long series of cases on this dispute.)
>
> It did not have to decide because West Virginia ultimately paid the judgment . . . . Patience by the Court, and the moral suasion of its decree, are likely to be more satisfactory in resolving these delicate interstate controversies than is a more coercive attitude."

C. The Political Status of Interstate Compacts:

Politically, interstate compacts are weak and their status ambiguous. A compact commission has no independent constituency. A compact region is not a polity. A compact is a joint venture of a number of polities. Therefore a compact commission or agency is ill-suited to the making of prescriptive policy. It is analogous to an administrative agency not a legislative body. Beyond the prescriptive policy contained in the originating compact, it can but fill in the details, like the quasi-legislative rule making of ordinary administrative agencies. Ultimately, a compact commission only implements policy. But, as suggested, the originating compact or its amendments can create prescriptive policy binding between the states and within the compacting states.

The Ohio River Valley Water Sanitation Compact is a good example of an administrative compact with rule making authority. Many credit ORSANCO with substantial success in its task of cleaning up the Ohio River and its tributaries. See the Barton book (pp. 33-47) cited in the review of literature. Barton concludes with a caveat, however:

> "The Ohio River Valley Water Sanitation Commission's opposition to the exercise of national governmental power within its jurisdiction parallels in a way the behavior of the Interstate Oil Compact Commission and the Atlantic States Marine Fisheries Commission. But there is an important difference. The latter two agencies have never attained significant autonomy as governmental institutions; the oil and fishery industries simply have acted through the compacts to prevent federal controls which they perceive as detrimental to their substantive interests. The Sanitation Commission, on the other hand, wields some political power on its own; conflict between the interstate agency and federal agencies should be viewed as a struggle for power among public institutions, as well as a struggle among private groups acting through the compact over the allocation of substantive values. The distinction is important because the additional level of conflict within the federal system renders intergovernmental cooperation more difficult to achieve."

A compact designed purely to coordinate state regulatory activity so as to avoid interstate conflict would at first blush not seem to require the transfer of political power to a compact commission. But unless such coordination can be accomplished with but one agreement, the coordination will require some ongoing decision-making machinery. Most coordination is dynamic, not static. Moreover as dynamic coordination approaches prescription, it does seem to require the significant transfer of political power to a compact agency. It ultimately would be acting as a sort of one issue regional congress. That will not work. A regional "congress" even where it is only resolving interstate disputes does not fit into our constitutional scheme. Issues of one person, one vote, (mentioned earlier) would be realistically raised. Why should Ohio and Illinois and Pennsylvania have only the same vote as the much less populous Kentucky and West Virginia. On the other hand, Kentucky and West Virginia would not likely be induced to join a compact with a voting privilege based on population. Something like the "great compromise" of the national bicameral legislature, which Catherine Drinker Bowen called the Miracle at Philadelphia,* would be necessary. Not only would a regional miracle be politically improbable (to say the least), it is not what the Compact Clause envisioned, nor would it avoid the one person, one vote prescription in any event. Even state senates must follow that structure, the analogy to the federal Senate having been rejected by the Supreme Court.

Since interstate coordination of power plant siting will be a dynamic process, as it approaches prescription it will require some mechanism for renewed state ratification. This suggests either that non-prescriptive coordination be tried or a new kind of two step or ongoing ratification process be used. The next section attempts to deal with this problem by suggesting a range of possible uses of the compact device from non-prescriptive to prescriptive, from the use of existing compacts to the formation of new ones.

One final caveat, Felix Frankfurter's vision of regional utility compacts has not seen a single instance of fulfillment. Thursby, in his chapter on "Cooperative Federalism: Uses of the Compact", concludes a brief discussion of "Utility Regulation" [its only use has been for joint government-owned projects—canal, river tunnel, bridge, waterworks plant] with:

> "Local privately owned utilities usually are no respecters of state lines and consequently pose real problems of regulation. The Compact affords a compromise between extreme centralization of control and ineffective regulation through individual state action."

But no examples, no attempts, are cited. That's because there are none so far.

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*See, Bowen, Miracle at Philadelphia, The Story of the Constitutional Convention May to September 1787, (Atlantic-Little, Brown; Boston; 1966).

Section 6: The Interstate Compact as a Solution to the Interstate Coordination Problem.

A. Discussion of Various Uses:

Introduction

As the previous section remarks, the interstate compact has not been used in regulation of the utility industry, electrical or otherwise. Neither has it been used to coordinate the regulation by the states of any segment of the economy where complex administrative machinery is in place or is necessary. However, it has been used to promote interstate cooperation in energy planning. The Southern Interstate Nuclear Compact and the Western Interstate Energy Compact are two examples. The former is a federally-sanctioned compact with 17 states (including Kentucky and West Virginia) and Puerto Rico participating. The latter has 12 state participants. The Southern compact has broadened its scope of inquiry to include other sources of energy than nuclear. It performs intelligence and promotional functions and has considerable vitality as an interstate advisor. The Western compact has a similar history. The Midwest Nuclear Compact designed "to foster industrial progress in the midwest through employment of scientific and technological advances in nuclear and related fields" (Interstate Compacts 1783-1977 published by the Council of State Governments, p. 18) has six members including Illinois, Indiana and Ohio but has no federal approval and seven other invited states have not yet joined.

These advisory compacts may be useful first steps in regional coordination of electric power development but they are not designed to coordinate the actual development of electrical power facilities. A compact could coordinate such development either by exchange of specific information, by allowance of other state participation (as interested parties) in state siting decisions, by non-mandatory regional planning of such decisions, by some form of mandatory regional planning of such decisions or by the ultimate step of collective regional decision making. Even the last step is probably legally feasible (political feasibility is another matter and beyond the scope of this study) through a fully developed federal-interstate compact. Any of the steps might be useful in preventing the kind of interstate friction and attendant protracted judicial actions reported at the October 24, 1979 ORBES meeting by the "Position Paper on the Interstate Transport of Air Pollution" of the Pennsylvania Department of Environmental Resources.

Wendell and Zimmerman stated in 1976:

> "Even among problems which have come to be recognized as heavily national in import, such as water and air quality, energy production and conservation, welfare services, and the processes of transportation and industrial production, federal legislation increasingly looks toward implementation of national policies by the States. However, in many instances, the most appropriate geographic areas for administration of some of the programs may be somewhere between State and Nation. In what is so far an important but limited number of instances, compacts have provided the necessary interstitial bridges to permit States to develop such regional administration. This has been done in some interstate river basins, interstate metropolitan areas, and in some culturally defined regions such as New England and the South. However, much more should be possible along these lines.

> While many compacts create new agencies to administer their provisions, a strength of the device is that it utilizes the existing governmental units and generally gives their governmental structures a place in the conduct of the intergovernmental relationship. The compact, whether or not it establishes an interstate or federal-interstate agency, is therefore a means of getting the existing federal and state apparatus to address itself to intergovernmental problems in concert, with the intergovernmental agency as a specialized staff resource for the purpose." (*The Law and Use of Interstate Compacts,* pp. 108-109.)

To accomplish some or all of the coordinative steps suggested above, an existing compact, an amendment to an existing compact, or a new compact could be used.

(1). *The use of an existing compact*:

Article VIII of the existing Ohio River Valley Water Sanitation Compact states:

> "The commission shall conduct a survey of the territory included within the district, shall study the pollution problems within the district and shall make a comprehensive report for the prevention or reduction of stream pollution therein. In preparing such report, the commission shall confer with any national or regional planning body which may be established, and any department of the Federal Government authorized to deal with matters relating to the pollution problems of the district."

The ongoing or periodic nature of the mandated "study" is indicated by the last sentence of this Article VIII:

> "The commission shall more than one month prior to *any* regular meeting of the legislature of any state which is a party thereto, present to the Governor of the state its recommendations relating to enactments to be made by any legislature in furthering the intents and purposes of this compact." (Emphasis added.)

Although the purpose of the Compact and of the mandated study is clearly to prevent water pollution, a "comprehensive report" on its prevention surely cannot ignore the other potential impacts--environmental, economic, and now even energy resource—of any potential source of water pollution. Determining the optimum long terms means of preventing water pollution must take into account the other impacts. This is especially true in light of the extensive federal law controlling all forms of pollution and energy resource consumption. It is all one interconnected whole. Therefore ORSANCO could require all its member states to supply it with information as to long-range plans for power plant siting in their state or request such information from the Federal Energy Regulatory Commission, information presently supplied to it annually by the private utilities regional reliability councils. ORSANCO could then compile and augment this information and distribute it to its member state, with or without specific recommendations. ORSANCO could well serve this clearing house function with a few extra personnel but no further legal mandate. It should be pointed out that the Ohio River Basin Commission could also perform this function.

(2). The amendment of an existing compact:

The ORSANCO Compact could also be amended. Article III provides in part that ORSANCO shall have "such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the signatory states, or by act or acts of the Congress of the United States." In light of the interconnected nature of environmental, energy and other impacts of power plant siting and of the interstate character of these impacts, it would not be outside the general character of the original compact to add to it a regional power plant planning function so as to facilitate coordination of individual state's siting decisions and to minimize interstate friction and the protracted litigation that inevitably follows such friction. An ounce of planning might prevent a pound of litigation. I am not suggesting that such an amendment should be taken but that it would legally be feasible to so amend.

The first example in "B" of this section sets out what such an amendment might look like. The two steps of creation of a long-range regional plan with subsequent submission of the plan to the member states, avoids the problem mentioned in the last section of giving legislative power to an interstate organization. The various options as to subsequent state action give the planners incentive to try to be absolutely fair to each state and at the same time to know that everyone need not be completely pleased in order for the plan to have some efficacy. The legislatures will only receive rights under the plan if they are willing to assume reciprocal obligations.

(3). The creation of a new federal-interstate compact:

A new federal-interstate compact with a commission structured as in Delaware River Basin Compact but with powers and duties designed solely to coordinate state siting decisions on a regional basis could be given a range of powers. It could act merely as a central clearing house for each state's siting plans (if any) or for the siting plans of all the utilities within the region. It could be an agency that assesses the information gathered, making estimates of the region-wide impacts of any proposed sites, etc. It could be an agency that makes a non-mandatory region-wide power development plan. Or ultimately it could be an interstate agency that creates a plan with a range of options as to enforceability. For instance, the plan could be "optionally mandatory." In that case each member state would accept or reject the regional plan. Acceptance would mean that the accepting state binds itself to follow the plan in making individual decisions within its jurisdiction and has the right to force other accepting states (through a suitable tribunal) to also adhere to the plan. The perceived suitability of the dispute resolving tribunal would be crucial to the acceptability of this option. Such tribunal must be neutral (and be perceived as neutral), capable of developing the facts, expert at interpreting the plan, and capable of acting swiftly. It could be either:

(i) The United States Supreme Court exercising its original jurisdiction to settle disputes between states;

(ii) A special tribunal composed of life-tenured federal judges appointed on an ad hoc basis by the Chief Justice of the United States with minimal review of its decision by the United States Supreme Court;

(iii) A special arbitration tribunal appointed by the member states on either an ad hoc basis or as a permanent arbitration panel again with minimal United States Supreme Court review.

> The decision of the tribunal would be either (A) to enjoin the state decision, (B) affirm the state decision, or (C) remand for the state to either accept a modification or condition on its original decision or to entirely abandon it.

Alternatively, the plan generated by the agency could, on approval by the commission, become mandatory on all the member states with review by any member state in a special tribunal using any of the options above in (2)(b) within a short period (30 to 120 days) of its publication. The plan could then be enforced by any member state by disputing as inconsistent with the plan any other member states citing decision in a special tribunal (the same or different from the one approving the plan) or by the compact agency. If only the compact agency can enforce the plan it will itself become a forum for dispute settlement among the member states. It will have to hold hearings or conduct formal or informal negotiations among the states that disagree about a particular state's siting decision. The agency's decision as to whether or not to question a member state siting decision by proceedings in a special tribunal will itself become the subject of dispute which if not provided against will end up in court. I therefore judge enforcement by the compact agency only, unacceptable. A third possibility is the presentation of any proposed state siting decision to the agency for its approval. If approved then that decision can be appealed by any member state to a special "suitable tribunal." But the initial approval by the agency should carry some weight in the special tribunal. If the agency decision is not made on a record then the reviewing tribunal will act as a de nova (or trial) court. If made on a record then as any reviewing tribunal (based on a reasonableness standard).

B. Illustrative Examples of Hypothetical Interstate Compacts:

Introduction

These examples of institutional arrangements are designed to show in detail what might be done to coordinate state power plant siting decisions. They are intended to vivify the discussion on the potential for the use of the interstate compact as a coordinative arrangement.

The first example is an amendment to an existing compact: It has the advantage of using a proven commission with established institutions.

The second example is a new compact roughly patterned after the Delaware River Basin Compact and Susquehanna River Basin Compact, at least as to structure. The major difference is that these two existing compacts have primarily a development purpose which calls more for interstate cooperation than of coordination. Whereas, here the purpose is invocation of federal prescriptive policy with ultimate state application. This purpose calls for coordination of state action inter se and with federal action, rather than cooperation. A new compact has the advantage of allowing specific structural design to serve its unique purpose.

Most compacts have a preamble in which is recited either as a set of "Whereas" introduced clauses or as statement of "purpose" or "findings of fact" or both. I have included such preambles in the examples given here for the sake of completeness. The preambles are for the sake of form. Their substance is not this writer's or anyone else's endorsement of the facts or purposes stated therein.

(1). Example: amendments to the Ohio River Valley Water Sanitation Compact:

Amendments to the Ohio River Valley Water Sanitation Compact to Facilitate Interstate Coordination of Electric Power Facilities Siting and Development

Whereas: There exists a substantial body of federal law, which in the main prescribes standards of environmental protection and energy resource utilization, that directly affects the siting of new electrical generating facilities and the development of electrical capacity and reliability; and

Whereas, this body of federal law is applied and implemented through agencies of the individual state; and

Whereas, many of the individual state electrical facility siting decisions affect the environment, economy and energy-resource utilization of other states and especially certain neighboring states and affect the implementation decisions pertaining to electrical facility siting in such other states; and

Whereas, there is at present no means by which an acting state easily can take account of the affects of its decisions on other states or that such impacted state can force consideration by the acting state of such affects except through the uncertain process of protracted litigation;

Whereas, even if the extraterritorial and interstate environmental and other impacts of the siting of electrical facilities were considered in a state's decisions affecting or permitting such siting, there is at present no means of anticipating or resolving interstate disputes over such extraterritorial impact except through the uncertain process of protracted litigation;

Whereas, the Ohio River drainage basin in a natural interstate area of mutually felt environmental, economic and energy impacts such that the territory within the area has an interdependent environment and economic character and is distinct from other areas even though there is environmental and economic interaction with such other areas.

Whereas: There presently exists a Compact among the states of said Ohio Basin Region that established and has maintained for over 30 years a commission called the Ohio River Valley Water Sanitation Commission that has been highly successful in [promoting and]* facilitating cooperation of the member states [to the end of cleaning and maintaining in an environmentally sound condition the waters of the Ohio River and its tributaries]; or [in the control of new pollution and the abatement of existing pollution from the river, stream and waters in the Ohio River Basin];

Whereas: Direct implementation and application of environmental and energy policy by the federal government is unnecessary in order to effect coordination since regional coordination would be adequate and, also be more efficient and more responsive to state needs; and

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*Words in brackets are alternative phrases.

Whereas: Aspects of the problem of electrical energy generation development are interregional or national in scope and the federal government should be involved in the planning process to protect the interests of other regions and to coordinate where necessary interregional impacts and decisions; and

Whereas: The existing Ohio River Valley Water Sanitation Compact provides for federal representation in planning and decision-making.

Therefore, the states of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia, agree to amend their Ohio River Valley Water Sanitation Compact as follows:

Article I

Each of the signatory states renews in full the pledge of Article I of the original compact and further pledges to each other faithful cooperation and coordination among themselves and with the federal government in regard to decisions affecting the electrical utility's facility proposals and plans for the siting of, and other development of, new generating and transmission facilities so as to achieve the minimum disruption, destruction and despoliation of the land, water and air environment of the region, so as to achieve the maximum use of energy resources locally available to the region, so as to achieve the optimum development of electrical generating capacity for the region, and so as to guarantee an equitable distribution of unavoidable environmental detriments such that industrial and other economic development may proceed in each state consonant with federal minimum environmental standards and federal energy standards.

Article II

A district congruent with the District created by the original Article II [excluding that portion which drains into the Tennessee River] is hereby created to be called the Ohio River Basin Electrical Power Siting District.

Article III

In order to carry out the purposes stated in Article I of these amendments the commission created by Article III of the original compact is given the following additional powers:

(A) To create an Ohio River Basin Electrical Power Facilities Siting and Development Task Force (called the Siting Task Force). The sole duty of the siting task force will be to prepare and submit for the commission's disposal a Comprehensive [Ohio River Basin] Regional Electrical Power Facilities Siting and Development Plan (called the Development Plan). The Development Plan will be submitted no later than eighteen months [twenty] [twenty-four] from a date set by the commission as the beginning date of Siting Task Force work. The Development Plan will be written as far as possible in plain, non-technical language, will be as succinct as possible consistent with its task, will contain a glossary which will define in non-technical language any technical terms used and will define in plain language any word or words having a special use or which might be ambiguous, and will contain the following substantive sections:

(1) A review and analysis of evidence for the projected need for electrical energy in the District for the next ten years just following the date set for submission of the Development Plan and then for the next ten years following and for the next ten years following (thirty years in all) and separately stated conclusions as to the projected needs used for planning purposes in the Development Plan and as to how the contingency of such projected needs will be dealt with in the Development Plan.

(2) A review and analysis of evidence for the projected need for (or desire for use of) district generated electricity outside the district and a similar review of the projected use within the district of electricity generated outside the district, and separately stated conclusions used for planning purposes as to projected use out-of-district of in-district generated electricity and vice versa and how the contingency of such projected uses will be dealt with in the Development Plan.

(3) A review of plans submitted by each electric utility having generating facilities in the region or that serve the region of its own long range plans for the construction of new electrical generating facilities or for the expansion of facilities at existing sites. This review will, after detailing each utility's plans as to location, size and type of expansion (including removals), analyze the likelihood of the aggregate projected electrical energy capacity meeting the needs for electrical energy projected in Section one and the desire for energy projected in Section two.

(4) A review and analysis of the total environmental impact means the impact the proposed project would have on the immediate locale, on the local region, and on the total region measurably impacted, in the short run (up to five years) and in the long run (up to thirty years) and environment includes the total physical (land, water and air) environment, the economic environment, and the social environment. Emphasis should be on measurable physical impacts and the effect such impacts in conjunction with federal environmental and energy regulations and standards could have on future industrial and other productive development of any area affected.

(5) A review and analysis (in the same manner as Section 4) of the alternative sites submitted by electric utilities and of other prospective sites (including expansion at existing sites) discovered by the Siting Task Force.

(6) A Plan for future electric power development in the division. This section puts together the information and analysis of the first five sections in a way that clearly indicates approval or disapproval of each electric utility proposed site, the date construction ought to begin and any contingencies that might qualify approval or disapproval (including size of generating capacity) and shows the regionwide development plan.

(7) A comprehensive set of maps showing existing and future sites, proposed and approved, proposed and disapproved, and showing proposed expansions and contractions of existing sites, approved and disapproved, and showing the bulk electric power grid that presently exists and as planned including interregional connections. This map section should be designed so as to make more vivid and coherent the Development Plan and will be used as a point of reference in the other sections of the Development Plan.

The Commission may authorize deviations from the above seven sections in form or substance if in the sole opinion of the Commission the deviation will help improve the Development Plan to the end of carrying out the purposes of this compact amendment.

(B) To appoint to the Siting Task Force such full-time people not to excede twenty (excluding secretarial, clerical and other support staff) who in the commission's judgment have the necessary training and experience to carry out the duties established in III (A) of this compact amendment but should include at least one person who by training and experience has special knowledge and judgment in the following areas of study:

(1) Air quality control
(2) Water quality control
(3) Land use control
(4) Energy economics
(5) Industrial economics
(6) Urban planning
(7) Agronomy
(8) Bulk electrical power distribution
(9) Electric power plant construction
(10) Electric power plant engineering (including site improvement)

(C) To determine the compensation and working arrangements of the Siting Task Force it being understood that this Compact amendment anticipates that the Siting Task Force will be in substantial part a group of highly qualified people working together full-time at one location unless in the opinion of the Commission existing or pending studies done for other governmental agencies such as the Ohio River Basin Energy Study obviate to some extent the working arrangement anticipated above.

(D) To charge the cost of the Siting Task Force and any other costs incurred by the Commission pursuant to the purposes of this compact amendment to member states according to the provisions of Article X of the Compact following the procedures established by the Commission pursuant to Article V.

(E) To require all electric utilities to prepare a report of its plans for electric generating and transmission facilities for at least the next ten years, the report to be in such a form and containing such information as the Commission in consultation with the Siting Task Force finds necessary to establishing the Development Plan, making it clear to each electric utility the intended use and effect of its plans.

(F) To empower the Siting Task Force to require (in addition to the electric utility report required in (E)) such reports of private individuals, groups, labor unions, corporations, or any other entity, public or private (including municipal or other local governmental entities) located in the member states as the Siting Task Force thinks useful to carrying out its purpose. Any individual, group, or entity may submit such information or ideas to the Siting Task Force as such individual, etc., thinks appropriate. Where it deems it appropriate it may pay the cost of production of such report or reports.

(G) If any report required pursuant to (E) and (F) is not forthcoming and in the opinion of the Commission the requirement of such report is reasonable it may seek an order from a state court of record having jurisdiction over the individual or entity refusing to produce the report by whatever local process is appropriate and adequate, and the member states authorize their courts to issue such orders after a hearing held as soon after the request as it is possible to give due notice. The sole issue at the hearing will be whether or not the required report will contain information likely to further the goals of the Siting Task Force, whether the required report exists or can be reasonably produced by the requested individual or entity and the court shall forthwith issue its order for all or such part of the required report as it finds appropriate and under such conditions (including payment for the cost of its production) as it deems appropriate. Appeal from such order shall be directly to the highest appellate court of the state, notice of which must be filed with the clerk of such high court within five working days of the order, the record of such proceeding must be prepared by a certified court reporter from tape or other mechanical device taken at the hearing and reproduced for all parties, all at the Commission's cost regardless of who initiates the appeal and must be filed by the Commission within thirty calendar days of the notice or the requested order will be deemed finally denied. The court appealed to will immediately set a date for argument by attorneys for the parties which date shall be no earlier than ten days nor later than thirty days after the record is filed or as soon thereafter as a quorum of the court can be assembled. Written briefs may be filed by either side prior to the hearing but not after.

From the record, oral argument and written briefs, if any, the reviewing court shall decide whether the trial court order was reasonable or not and forthwith affirm or reverse or reverse and remand with instructions. The order of affirmance or reversal shall be issued on the same day as the hearing. All costs of the appeal including reasonable attorney's fees shall be apportioned by the court but in any event the Commission shall be required to pay at least its own costs.

(H) At the request of the Siting Task Force or of any other interested individual, group or entity to hold such public hearings as will in the Commission's sole judgment further the purposes of this compact amendment and any such hearing ordered shall be at such time and such place and under such conditions as the Commission deems appropriate.

(I) When the Siting Task Force submits its completed Development Plan to the Commission for disposition, the Commission shall hold public hearings at such time and place and under such conditions as in its sole judgment it deems appropriate. The hearings need not be before the entire Commission but the Commission members of each member state may hold hearings in their respective state provided however that before final action is taken on the Development Plan at least one formal public hearing will be held before the Commission sitting as a body and at which at least the following will have an opportunity to speak:

(1) Spokesman for each member state's utility industry
(2) Spokesman for the East Central Area Reliability Coordination Council (ECAR) [and for other regional reliability councils that include ORSANCO states in their region] and the National Electrical Reliability Council
(3) Environmental groups spokesmen
(4) Each member state's municipal league

(J) To adopt or to reject as submitted or to adopt with such modifications as it deems appropriate the Development Plan submitted by the Siting Task Force and cause such Plan to be published as the Ohio River Valley Water Sanitation Compact Amendments Electric Generating Facility Siting and Development Plan the short title of which shall be the Electric Power Plan of ORSANCO "EPPO" for short. The decision to adopt or reject or to adopt with appropriate modifications shall be made as expeditiously as is possible but in no event more than six calendar months [90 days] [four months] after the submittal by the Siting Task Force.

Article IV

The Electric Power Plan of ORSANCO (EPPO hereafter) shall be submitted to each member state's legislature at its first regular session after adoption. The member states can either:

(A) Adopt EPPO as mandatory such that it gives positive direction to future official state siting decisions, and any decision by any state official with siting authority can be challenged by any other member state that has made EPPO mandatory in an original action before the Supreme Court of the United States under Title 28, § 1252(a)(1), United States Code, and the sole issue in such action shall be "Is the challenged state decision in substantial compliance with EPPO?"

(B) Adopt EPPO as advisory only in which case any official state siting decision in substantial conformity to EPPO should be affirmed by whatever state court or courts has reviewing authority and in which case the state agrees to give notice of a pending citing decision to other states that have adopted EPPO as mandatory or advisory and to allow those states to appear and give testimony at any hearing prior to a citing decision and such states shall have standing in the state's courts to appeal the citing decision by whatever state procedures are ordinarily available, if any.

(C) Adopt EPPO as informational only in which case the legislature neither approves nor disapproves the EPPO and any use of EPPO by a state electric power siting decision maker is permissive only. The state does, however, promise to inform other member states immediately of official siting decisions or of other electric power siting or development plans within the state that come to the state's attention whether in conformity to EPPO or not.

(D) Reject EPPO in which no further duties or rights arise under this compact amendment except to pay whatever remains of that state's share of the Article X cost of preparation of EPPO.

Article V

When at least two member state legislatures have adopted EPPO then the commission shall have the power to create a standing committee to review EPPO biannually, and it shall recommend to the Commission such changes in EPPO as are necessitated by change in federal law or member state law or by other changes in conditions in the District and it may recommend such other changes that it finds, after careful study, will make EPPO better serve the coordinative purposes of this compact including the efficiency of EPPO's use, and it may make any other recommendations that it deems will serve the coordinative purposes of this compact.

The Commission may authorize this committee to have such studies made either on a continuing basis by personnel employed by the commission or on a periodic basis by contract or otherwise as will enable the committee to make its biannual review and update recommendations on EPPO.

Any such recommendations as to changes in EPPO may be accepted or rejected in whole or in part by the Commission and any change shall go into immediate effect upon acceptance but any member state that has adopted EPPO (under Article IV(A), (B) or (C)) may reject the change and that state's status becomes from that time that of a rejecting state under Article IV(D). An adopting state has until the end of the first full regular session of its legislature after the EPPO changes are announced to reject the change and become a rejecting state. In the interim between the announcement of the change in EPPO and any adopting state's rejection of EPPO as changed, EPPO as changed shall have the same force and effect as EPPO had before the announced change.

Article VI

The Commission may establish a permanent agency with permanent offices and employees to interpret and study EPPO. Such agency may be authorized to answer any question asked by any affected electric utility or member state agency or any other person, group or agency designated by the Commission, as to the specific meaning of EPPO with regard to any proposed or possible siting of generating or transmission facilities. The Commission may make such rules and regulations as it deems best serves the purposes of this Compact to govern the agency including, but not limited to, the form and substance of requests for information on and interpretations of EPPO, the form and significance of answers to such questions and the process of oversight by the Commission, if any.

(2). Example: a new federal-interstate compact (pertinent parts):[*]

The Ohio River Basin
Electric Power Generation
Siting and Development Compact

(1) The short title of this compact is The Ohio River Basin Electrical Siting Compact (ORBESC).

(2) The purpose of this Compact is to establish a means of coordinating on an interstate regional basis, state and federal implementation of existing federally mandated policy, which is concerned principally with environmental protection and energy resource utilization, as it directly affects the siting and other development of new electrical generating and transmission capacity and reliability by the electrical utility industry. The wisdom and feasibility of this compact is based on the following findings:

The Ohio River Basin, an interstate region, has a natural character as an energy resource area, energy market area and environmental area. The problem of the siting of electrical generating facilities consistent with federally mandated energy and environmental policy can best be solved by an interstate regional invocation process but with ultimate application and enforcement power left to the individual states. Moreover, important aspects of this essentially regional problem are national or interregional in nature. Furthermore the federal laws that particularly affect the power siting process such as the Clean Air Act, The Water Pollution Control Act Amendments of 1972, the Solid Waste Disposal Act, and the Surface Mining and Reclamation Act, provide for individual state implementation of primary federal policy and specifically encourage interstate regional cooperation and coordination. Furthermore the future energy needs and the alternative means of meeting such needs in an environmentally sound way have been thoroughly studied in a project of federal-state cooperation called the Ohio River Basin Energy Study. Finally, the electrical utility industry with the encouragement of the Federal Energy Regulatory Commission and with specific Congressional authorization have formed themselves into nine regional reliability councils under a coordinating national organization (National Electrical Reliability Council) and one of such regions, the East Central Area Reliability Coordination Council (ECAR) corresponds to a large extent with the Ohio River Basin.

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[*] This example contains only the pertinent part of the total compact which would be much too long to fully set out here and is unnecessary to our purposes. See Delaware River Basin Compact which can be found at 32 § 815.101 et seq. Penna. Statutes Annotated, which contains some 36 pages of text; and the Susquehanna River Basin Compact of 32 § 820.1 et seq. Penna. Statutes Annotated which contains some 28 pages of text.

Section 2.2 Commission Membership

The members of the commission shall be the governor, ex officio, of each signatory state, or, such governor's designee, acting on his behalf, and two members to be appointed by the President of the United States each to serve at the pleasure of the President.

Section 2.3 Alternates

An alternate for each member of the commission shall be appointed by each member unless otherwise provided by the laws of the signatory state. The alternate, in the absence of the member, shall represent the member and act for him or her.

Section 2.4 Compensation

Members of the commission and alternates shall serve without compensation from the commission but shall be reimbursed by the commission for necessary expenses incurred in the performance of their duties.

Section 2.5 Voting Power

Each member is entitled to one vote. No action of the commission may be taken unless a majority of the membership [unless five members]* vote in favor thereof.

Section 2.6 Organization And Procedure

The commission shall provide for its own organization and procedure, and shall adopt rules and regulations to govern its meetings and transactions. It shall organize annually by the election of a chairman and vice-chairman from among its members. It shall provide by its rules for the appointment by each member in his or her discretion of an advisor (to serve without compensation from the Commission), who may attend (if the rules so provide) all meetings of the commission and its committees.

Article 3. Powers and Duties of the Commission

Section 3.1 General Purpose Of The Powers And Duties Of The Commission

The commission is created by the signatory parties to coordinate the efforts of the various agencies of the member parties responsible for decisions regarding the regulation of the siting of new electric power generating and transmission facilities, and of the expansion and contraction of existing generating and transmission facilities. This coordination requires region-wide long-range planning that is flexible and self-adjusting and subject to periodic revision as circumstances may require. Efficiency, essential to any sound regulation, is especially crucial to the regulation of electrical generation facility siting and construction which siting and construction is extremely complex and expensive.

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*Bracketed words are alternative wording.

Therefore, the states of Indiana, Illinois, Ohio, and West Virginia and the Commonwealths of Kentucky and Pennsylvania and the United States of America do hereby solemnly covenant and agree with each other, upon the enactment of concurrent legislation by the Congress of the United States and by the respective state legislatures, to the Ohio River Basin Electrical Facilities Siting Compact which consists of this preamble and the following Articles:

[Alternative A: Planning Only]

Article 1. Definitions, Purposes and Limitations

Section 1.1 Definitions

For the purposes of this compact and any supplemental and concurring legislation enacted pursuant to it:

(1) "Basin" shall mean the Ohio River Basin excluding the Tennessee River and that part which drains into the Tennessee River and including all other areas that drain into the Ohio River.

(2) "Commission" shall mean the Ohio River Basin Electric Facilities Siting Commission, hereby created, and the word, "commissioner," shall mean any member thereof.

(3) "Electrical facility" shall mean any facility for the generation or transmission of electrical energy whatever the ultimate source of energy or the means of transmission.

(4) "Federal government" shall mean the government of the United States of America, and any appropriate branch, department, bureau, division, or agent thereof.

(5) "Local government" shall mean that portion of state sovereign authority exercised by municipal corporations, county governmental entities or multi-county regional agencies.

(6) "State government" shall mean that portion of state sovereign authority exercised by agents having state-wide authority.

(7) "Person" shall mean an individual, corporation, partnership, or unincorporated association.

Article 2. Organization

Section 2.1 Commission Created

The Ohio River Basin Electric Generating Facility Siting Commission is hereby created as a body politic and corporate, with succession for the duration of this compact, as an agent and instrumentality of the governments of the respective signatory parties.

Therefore this compact envisions the interstate coordination of the application of facility siting policy with improved efficiency provided by compact commission recommendations to, and supervision of member state application of, primary federal prescriptive policy and state prescriptive policy that is consistent with federal policy. The creation of substantive regulatory policy, as such, is not the business of this compact or its commission. Interstate coordination of the application of the federal and state policy should assure that the extraterritorial or interstate impact of any member state's application of policy is taken into account before any crucial decisions of application are taken and that such extraterritorial interests affected have due influence on any crucial decision, but at the same that the federal and state decision-making process of application be speeded up. The presence of two federal members on this commission is to assure that the invocation and application of primary federal policy is true to Congressional intent and that the interests of non-party states affected by party state application decisions are considered and protected.

Section 3.2 Duties Of The Commission

The Commission shall have the following duties coupled with the power to fulfill them:

(A) In accordance with the specification contained in Article 4, to develop, or cause to be developed, and to adopt a Comprehensive Plan for the Ohio River Basin Compact area for the siting of new electric generating facilities and new transmission lines for, at least, the ten years and as far beyond that as prudent planning allows.

(B) In accordance with the specifications contained in Article 5, to create an Ohio River Basin Electrical Siting Agency (Siting Agency) as a perpetual entity and to establish and amend, when occasion demands, such rules and regulations for the conduct and governance of the Siting Agency as the Commission deems appropriate and to review and oversee the Siting Agencies activities on a regular or periodic basis.

(C) Make recommendations to the member parties of legislation and other means by which the member parties could improve regulatory efficiency or adjust their regulatory policies so as to better achieve the party's regulatory purposes and to better achieve an equitable distribution among the member parties of the benefits and burdens (environmental and otherwise) of electrical facility expansions and contractions and to make joint recommendations to each party as to the means of achieving greater coordination of regulatory activity to the ends of greater efficiency and a more equitable distribution of siting benefits and burdens. The commission should make such recommendations to the various legislative bodies (including Congress) as it deems appropriate on an annual basis and shall make such recommendations on the request of any agency of any member party.

Section 3.3 Powers Of The Commission

In order, better to carry out its duties the commission shall have the following additional powers:

(A) To require the electrical utilities doing business within the member states to furnish such information as to their plans for expansion and contraction of services within the Ohio River Basin, over the next ten to twenty years, as the commission or the Siting Agency deems useful to the discharge of its duties. This information may include, but is not limited to, planned new site facilities, alternatives to new site facilities, expansions or contractions of existing or planned generating facility capacity, new transmission line routes, alternative new routes, alternatives to new routes, the environmental impact of planned new facilities and of alternatively sited or alternatively constructed new facilities and of the expansion of old facilities, of planned new transmission routes and of alternatives; . . . .

(B) To require each state, each local and each federal agency that the commission identifies as having authority to issue licenses or permits which could have any significant affect on present or future siting decisions to furnish such information as to their own operations and policies and such information pertinent to present or future siting that they may possess as the commission or the Siting Agency deems useful to the discharge of its duties. [There would follow more powers which might include the right to identify and review projects currently in the works; to promulgate the "plan" within a certain time; to seek court injunctions to enforce the above powers as to data gathering or to enforce the plan, once promulgated, or to initiate the submission of any dispute as to siting to a designated court (such as the United States District Court for the District of Columbia) or a special or ad hoc court; to hold public hearings concerning the plan or its revision; to have such others powers as are necessary to carry out its purposes. An Article 4 would detail what the plan was to contain. An Article 5 would detail the composition, powers and duties of the compact agency. An Article 6 would be general and deal with miscellaneous items such as power to acquire property, spend funds, submit budgets, etc.]

CHAPTER IV. JUDICIAL REVIEW AND STANDING TO SUE

Section 7: Judicial Review as Crucial to the Problem and Solution of Efficient and Just Regulation of Power Plant Siting.

Because the nature and scope of judicial review is central to the efficiency of any regulatory scheme, a discussion at some length is essential as a background to any of the proposals for interstate coordination of power plant siting decisions. The question is how can the time and cost of much judicial review be limited while preserving the benefits of review--public access to the regulatory scheme and public confidence in a just application of public policy. To that end, there follows a discussion of what judicial review is, its history, the standards of review (with comparison to standards of proof), and who has access to review--"standing".

A. The Nature of Judicial Review:

(1). What is judicial review?

Judicial review in its broadest sense refers to the power of the "regular" courts (state and federal) to review the acts of the other organs of government, legislative and executive. Judicial review has two main lines: The review of legislative action for unconstitutionality and the review of administrative action for statutory illegality.* We are primarily concerned with administrative judicial review, and the further discussion concerns such review unless otherwise indicated. Administrative judicial review is concerned with review of administrative agency action. This action by agencies such as the numerous independent federal agencies (and other not so independent agencies like EPA) and state agencies like the various public utility commissions is nominally "executive" but these executive acts are often quasi-legislative or quasi-judicial in nature. It is mostly decisions of this nature performing prescription and application functions, as opposed to the invocation function (see glossary of terms), that are judicially reviewable. These prescriptive and applicative powers of administrative agencies are called "quasi" because on the legislative side they do not set primary policy** but only secondary policy, i.e., they give detail and greater particularity to more general policy but in a form that is legislative--prospective rules of general application. Therefore they are legislative but only "quasi" so. On the judicial side, these agencies apply the primary and secondary policy to specific incidents. This is the "application function" usually performed by courts. Agencies, however, almost always lack the fully coercive sanction that courts have. Therefore, their application is judicial but only "quasi" so. The review of agency action varies with the function performed the action as is discussed further in B(3) below.

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*Legislative action is reviewed for unconstitutionality almost always by bringing the executive charged with implementing the legislation into court, so it has the appearance of administrative judicial review. Moreover, challenges to the legality of administrative action are often coupled with challenges to the constitutionality of the act being administered such that there is both kinds of review in the same legal action.

**State and federal constitutions forbid such "delegation of legislative authority", see, L. Tribe, American Constitutional Law, 284-90 (1978).

(2). When and where is judicial review?

Judicial review is usually provided for in the act creating the regulatory scheme if such scheme involves the use of some special agency for its invocation and application aspects. For example, see § 4906.12 and §§ 4903.10 through 4903.20 Ohio Revised Code for judicial review of Ohio Power Siting Commission orders; see 42 U.S.C. § 7604 ("Citizens suits"), § 7607 ("Administrative Proceedings and judicial review") for judicial review of Clean Air Act administration; and 33 U.S.C. § 1369 of Water Pollution Control Act, and 42 U.S.C. § 6976 of the Solid Waste Disposal Act for judicial review of administration of those acts.

If no special agency is to perform this invocation and application functions then it is assumed that regular procedures will be followed with application done initially by the courts, as with the usual criminal statute. That is not considered "judicial review", although within the judicial system there will be provision for "appellant review" of the initial judicial (trial court) decision. This appellant review is very similar in scope to the judicial review of administrative action.

If an invoking and applying agency is established, but judicial review is not mentioned, then a general review act usually will authorize review of the action or in the absence of such an act or even with such act one of the common law remedies of certiorari, prohibition, mandamus, or habeas corpus may be available. Finally, the inherent equitable power of the courts to issue injunctions or declaratory judgments is most often appealed to either in conjunction with the general act or without it. At the federal level the general review act is called the Administrative Procedure Act and is found in 5 U.S.C. § 551 et seq. with §§ 701-706 providing for judicial review. At the state level, an act based on the Model State Administrative Procedure Act is often found. The federal review acts do not specify the form of procedure (§ 703 of the A.P.A. (original § 10(b)) prescribes "any applicable form of legal action"), or the court that has jurisdiction. The state model act does (§ 15(b)) but review under that act is not exclusive of other traditional remedies (§ 15(a)).

The most interesting and troublesome of the traditional common law remedies is mandamus. The writ of mandamus is used to force a public official to do his clear duty (owed plaintiff) under the law. It is not supposed to be used to control the exercise of discretion by public officials but only to force them to do what the law clearly mandates they do (sometimes called "ministerial" tasks, as opposed to "administrative" tasks). But it is used to force the exercise of discretion where an official has a clear duty to exercise discretion but it is not used to control the discretion exercised. But often a court is persuaded that the choice made by an official is not within the choices permitted by the law. The court then declares that the official did not do his clear duty to exercise discretion under the law, rather the official "abused his discretion". By this legerdemain mandamus is often used to review discretionary official action. Mandamus actions are very common in state courts.

The federal action in the "nature of mandamus" (writ of mandamus having been abolished by the Federal Rules of Civil Procedure) is provided by 28 U.S.C. § 1361, allowing an action in any district court (where proper venue lies) and not just the District of Columbia courts where most agencies are headquartered.

At the federal level, the review provision of the Federal Trade Commission Act is the prototype of statutory provisions for petitions for review. It has been substantially copied into the Securities Act, the Securities Exchange Act, the Public Utilities Holding Company Act, the National Labor Relations Act, the Federal Power Act, the Federal Aviation Act, the Natural Gas Act, the Food and Drug Act, and at least a dozen or more additional statutes.[*] It provides that

> "any person . . . required by an order of the Commission to cease and desist . . . may obtain a review of such order in the circuit court of appeals . . . by filing . . . a written petition . . . . A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Commission . . . . The Court shall have jurisdiction . . . to make . . . a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed . . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari . . . . The jurisdiction of the circuit court of appeals to affirm, enforce, modify, or set aside orders of the Commission *shall be exclusive.* Such proceedings in the circuit court of appeals *shall be given* precedence over other cases pending therein, and *shall be in every way expedited.*" (Emphasis added.)

When federal administrative action is reviewable, it is probably reviewable by a proceeding for an injunction or for a declaratory judgment or both, unless a statute or a custom makes some other form of proceeding exclusive. But even when a statutory form of proceeding is made exclusive by statute, a court may find an injunctive or declaratory proceeding the appropriate means of review when the statutory method is unavailable. For example, despite the provision of the Labor Act that "the jurisdiction of the court (of appeals) shall be exclusive, the Supreme Court has held that a district court had jurisdiction of a suit to enjoin the Board's action in excess of its powers (*Leedom v. Kyne*, 358 U.S. 184 (1958)) and has affirmed an injunction against an order of the Board dismissing a proceeding (*Leedom v. International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145 (1956)), and despite a provision of the Selective Service Act of 1967 that "No review shall be made of the classification . . . except as a defense to a criminal prosecution . . ." the Supreme Court has allowed pre-induction review of a "blatantly lawless" classification of a theological student as I-A (*Oestereich v. Selective Service System Local Board*, 393 U.S. 233 (1968)).[**]

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[*] Davis, *Administrative Law Text*, 3rd Ed., p. 441 (1972).

[**] Davis, *Administrative Law Text*, 3rd Ed., p. 445 (1972).

Injunction and declaratory judgment are important not only as forms of proceedings for review of federal administrative action but also as the customary means of review in the federal courts of state administrative action. Even when state statutes prescribe other methods for review in the state courts, the method for obtaining review in the federal courts is by injunction or declaratory judgment. Such "review" in federal court must be based on diversity of citizenship (42 U.S.C. § 1332) or on federal right (under the Constitution, Act of Congress or occasionally under federal common law). The federal rights claim must be that the administrative process or decision somehow violates such right. It is not "review" in the ordinary sense and the rules below about scope of review are not applicable to it. Such "review", is also limited by sovereign immunity and the Eleventh Amendment (see discussion in Section 2) and by the doctrine of exhaustion of administrative remedies. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Bacon v. Rutland R. Co., 232 U.S. 134 (1914). State judicial remedies ordinarily need not be exhausted, however. Occasionally, though, a federal statute will specifically require exhaustion of state judicial remedies before resort to a federal court can be had as with state utility rate orders under the Johnson Act of 1934 (28 U.S.C. § 1342). "Four conditions must be met for the statute to be applicable. (1) Jurisdiction must be based solely on diversity of citizenship or repugnance to the federal constitution, so that the statute will not apply if the order is claimed to be contrary to a federal statute. (2) The order must not interfere with interstate commerce. (3) The order must have been made after reasonable notice and hearing. (4) The order must be 'a plain, speedy and efficient remedy' in the courts of the state." C. Wright, Law of Federal Courts, 3rd Ed. (1976), at 216.

The review by federal courts of state administrative action is further complicated by "absention doctrine" practices whereby a federal court will abstain from exercising its jurisdiction in order to allow a state court to clarify ambiguous state law (Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496 (1941); Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). On a rare occasion this doctrine causes a federal court to completely dismiss the federal suit rather than the usual practice of merely delaying federal court exercise of jurisdiction until state court clarifying decision is obtained. For example in Burford v. Sun Oil Co., 319 U.S. 315 (1943) the federal diversity case was dismissed because the Texas oil field regulation scheme had its substantive and procedural aspects so intertwined in an interdependent ongoing process of rulemaking and adjudication that it would have been inappropriate to introduce an occasional and disparate decision maker (i.e., the federal court) into the process. Any federal issue could be reviewed in any event by appeal or certiorari from the state's highest court to the United States Supreme Court.

Finally, a specific statutory review is not necessarily a complete and exclusive alternative to the general common law system. A litigant, to be sure, must pursue the statutory method insofar as it provides an adequate remedy. But it may not. The statutory review is usually restricted to the record made at the administrative hearing. But the agency may refuse to hold a hearing or it may hold a hearing but refuse to decide the case or it may have been bribed to decide as it did, or have been improperly influenced by matter outside the record. In State v. Wrabetz, 231 Wis. 147, 285 N.W. 504 (1939), it was held that on a statutory review of a compensation award evidence would be received that the board had not read the evidence;

it may be pertinent that the statute did not explicitly forbid new evidence or that initial review was in a trial court. The Model State Administrative Procedure Act provides that though review is restricted to the record, evidence may be taken of alleged irregularities in procedure before the agency. If, however, on the statutory review new evidence cannot be received, the litigant must then seek a proper remedy: it may be mandamus or injunction. These remedies will be available unless the legislature has intended to exclude all remedies other than those specifically provided. If so, the exclusion may or may not be constitutional. Cf. Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920).*

(3). Summary history of judicial review:

Briefly, the pertinent history is this: From Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) where the President was held to be the sole unreviewable judge of the need to call the militia to Hadden v. Merrit, 115 U.S. 25 (1885) and Lem Moon Sing v. United States, 158 U.S. 538 (1895) the Supreme Court was reluctant to review administrative action without a clear mandate. But with American School of Magnetic Healing v. McAnnultz, 187 U.S. 94 (1902) the federal courts began the process of turning the presumption of no review to one of review. In American School, the Postmaster General had labeled the health claims of magnetic or electrical healing to be fraudulent and denied the use of the mails to American School. The Supreme Court said the efficaciousness of such methods of healing may be scientifically dubious but since the claims cannot be proven false they are not fraudulent. Since the Postmaster General's determination that such claims were "fraud" within the statute authorizing the stopping of mail was "a clear mistake of law . . . the courts must have power in a proper case to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual." Two things are apparent here: first, the court is willing to substitute its judgment for that of an administrator if the judgment is about the meaning of "law" and it feels strongly about the correctness of its judgment and second, individual rights (here to use the mails) are involved. Although the court asserted the mistake of law is "clear", a reasonable person might have concluded that "fraudulent" meant claims for which there is little or no scientific proof and that the credulous might rely on to their detriment. The Court apparently rejected this interpretation. But whether the Court was saying that it is "reasonable but wrong" or that it is just plain unreasonable is not clear. Courts have traditionally been willing to substitute their judgment for lower court judgments on legal questions even where the lower court judgment was reasonable.

In Stark v. Wickard, 321 U.S. 288, 309-10 (1944) the court in holding that silence does not imply no review of otherwise judicial issues:

> "The Responsibility of determining the limits of statutory grants of authority . . . is a judicial function . . . Congress established Courts to adjudicate cases and controversies as to claims of

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*Jaffe & Nathanson, Administrative Law, Cases & Materials, p.741 (1976).

> infringement of individual rights whether by unlawful (private) action . . . or by the exertion of unauthorized administration power."

Professor Davis concludes:*

> By the time the Administrative Procedure Act was enacted in 1946, the nineteenth century common-law presumption of unreviewability had quite clearly changed into a twentieth century common-law presumption of reviewability. Administrative action was reviewable unless (a) legislative intent to the contrary could be found or (b) some special reason called for unreviewability.

B. Scope of Review (Standard of Review):

The scope of review usually expressed in some vague standard such as "arbitrary", "abuse of discretion", "substantial evidence" is the product of an intuitive process without even a glimmer of precision and with little enlightening articulation. Much of the practice of judicial review of administrative action is inherited from appellant review practice, especially the review of the judgment of a judge and jury.

(1). Cold record factor:

The beginning point of each form of review is the "cold record". The record is called "cold" because the witnesses' oral testimony is not heard live--their demeanor, inflection, etc., is not observed. Since the manner in which testimony is given is thought to play a large role in determining its credibility** to the average auditor, determining credibility is often said to be solely a function of the initial fact-finding tribunal. But since credibility is also a function of factors that can be determined from the cold record--things such as internal consistency, externally caused bias (e.g., kinship, financial interest), general plausibility, and corroboration--reviewing courts sometimes second guess agencies or even juries on credibility issues. NLRB v. Pittsburgh S. S. Co., 337 U.S. 656 (1951) and especially Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) attributed substantial weight to the addition of "upon the whole record" to the substantial evidence test in the Administrative Procedures Act.

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*Davis, Administrative Law Text, 3rd Ed., p. 510 (1972).

**Credibility of non-expert witness is a function of four testamentary attributes: the witness's (1) quality of perception (e.g., distance, angle, eyesight, light, noise, hearing), (2) quality of memory, (3) sincerity and (4) quality of narration (i.e., articulateness). On a fully developed record only (3) and (4) are aided significantly by actual observation of the witness. (1) not at all, (2) perhaps slightly. The credibility of the expert witness (a witness who because of special knowledge or skill not possessed by the fact-finder is allowed to make inferences from raw facts that ordinarily would be left to the fact-finder) is very little aided by anything not in the cold record.

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight" including "contradictory evidence". (At 488.) And the reviewing court must reverse when the agency's decision clearly cannot be justified "by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both" (at p.490). (Emphasis added.) See Victor Products Corps. v. NLRB, 208 F.2d 834 (D.C. Cir. 1953).

Judge Learned Hand in NLRB v. Universal Camera Corp., 179 F.2d 749 (2d Cir. 1950), reversed and remanded by Universal Camera v. NLRB, supra, put the matter of the cold record succinctly:

> "Obviously no printed record preserves all the evidence on which any judicial officer bases his findings; and it is principally on that account that upon an appeal from the judgment of a district court, a court of appeals will hesitate to reverse. Its position must be: 'No matter what you saw of the witnesses and what else you heard than these written words, we are satisfied from them alone that you were clearly wrong. Nothing which could have happened that is not recorded, could have justified your conclusion in the face of what is before us.' That gives such findings great immunity, ..."

(2). The law-fact confluence and dichotomy:

To understand what a review standard means the process of review must be understood. In order to understand review the trial process must be understood. Trials whether before a judge, a jury or an administrative agency are the conjoining of law with fact. What is going on is the application of general policy to a concrete situation. Such conjunction of the wholly abstract with the concrete is by the use of words. Policy (the abstract intent of the legislature) and events are converted into words. The policy into words of lesser and lesser generality (or greater and greater particularity) from statutory language to interpretative rule to particularized interpretive rule and the events from raw sensory data retained in memory (or occasionally electronically or chemically) to words of immediate or primary description (called words of "primary inference") to words of greater and greater generality (called words of "secondary" or even "tertiary" inference) until the words coming down from the general and up from the concrete coincide, i.e., are the same. The process of "coming down" we call "questions of law"; the process of "coming up" we call "questions of fact". Somewhere approaching the confluence it becomes ambiguous as to whether one is "coming down" from general policy or "up" from facts and one "judge" may say a particular inference is a question of law, another a question of fact, and still another a mixed question of law and fact. See O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951).

The distinction between questions of law and fact are important for reviewing purposes. In general reviewing courts will correct the "mistakes" of a trial tribunal that are questions of law, i.e., it might say "yes the trial court's position is an arguable or reasonable inference as to what the law is but we think the opposite is more reasonable and therefore the trial tribunal is wrong and we will correct it". This is sometimes called the "rightness test". On the other hand if it is labeled a question of fact the reviewing courts might say "the ultimate inference of fact is arguable or reasonable from the evidence contained in the record and although we think the opposite inference also reasonable (in fact more reasonable) and might make it, we will not disturb your decision". This is often called the "reasonableness test" or the substantial evidence test. Thus the characterization of an issue as either a question of law or of fact is crucial. (See § 706 of the APA.) For instance, the ICC held that a railroad was not "an interurban electric". The Supreme Court in summarizing the evidence said that "[t]he facts are virtually undisputed". But for purposes of stating the scope of review, the Court said without qualification: "The Commission's determination was one of fact". Professor Davis* suggests that the Court's first statement implies that "the dispute was about the meaning of the statutory term" and thus a question of law. But the confluence analysis of the law-fact application process (stated above) suggests that this characterization is in the ambiguous area. Every time one points to some object and says "that is a ball, a horse or an interurban train" then one is both characterizing the object for communication or classification purposes, i.e., stating a "fact" about the object and one is also further defining the word "ball", "horse" or "interurban train". The Supreme Court's attitude about these confluence points is to call them questions of fact especially where it comes from an administrative body credited with expertise. See, for example, Rochester Tel. Corp. v. United States, 307 U.S. 125, 146 (1939) and Davis, supra, p. 546.

> "What is now often regarded as the leading case came in 1941, establishing what is known as 'the doctrine of Gray v. Powell'. The Bituminous Coal Act of 1937 was inapplicable 'to coal consumed by the producer . . . .' The railway filed with the Bituminous Coal Division an application for an exemption under this provision, and the Director, after hearing, denied the exemption. The railway leased coal lands from the landowners, arranged with the landowners simultaneously to lease the mining equipment to a contractor, and entered into an operating contract with a supplier to extract the coal at a flat rate or on a cost-plus basis. The supplier was called an independent contractor in the contract, and he managed the mining in his own way.
>
> "In upholding the Director, the Court declared: 'In a matter left specifically by Congress to the determination of an administrative body . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing . . . and an application of the statute in a just and reasoned manner'. The Court said that lack of dispute about evidentiary facts 'does not permit a court to substitute judgment for that of the Director . . . . Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'procedure' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the

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*Davis, Administrative Law Text, 3rd Ed. (1972) at 546.

Court's duty to leave the Commission's judgment undisturbed."

Nonetheless, the Court and lesser courts sometimes do substitute judgment on these matters. Davis theorizes:

> "Perhaps the reason the choice is kept discretionary instead of being governed by rules, principles, and standards of law is that some of the motivating considerations are intrinsically discretionary in that they cannot be fully discussed in formal opinions; the considerations that can be discussed interact with the considerations that cannot be, so that often none can be openly discussed. The opinions are accordingly devoted to formulas, precedents, analysis of law and fact, and only to a slight extent articulation of theory about review.
>
> "The discretionary determination of scope of review of application of legal concepts to undisputed or established facts probably depends upon (1) comparative qualifications of courts and of agencies, (2) the quality of the particular agency, (3) judicial impressions of the thoroughness and expertness of the administrative handling of the particular case, (4) the extent to which the agency is exercising power that has been especially delegated to it and withheld or withdrawn from the courts, and (5) whether or not lawmaking by the court is needed or appropriate in the particular case.
>
> "The fact of comparative qualifications is especially important. Although courts often emphasize--and sometimes over emphasize--agency expertise, they do not usually emphasize that judges, not agencies, are the experts or comparatively the experts in many areas, including constitutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation, most analysis of legislative history, fair procedure, and problems transcending the particular field of the agency.
>
> ". . . A good deal of emphasis should be given to a penetrating observation by the Attorney General's Committee on Administrative Procedure: 'In exercising their powers of review, the courts have been influenced, it is commonly thought, by a variety of inarticulate factors: (1) The character of the administrative agency, (2) the nature of the problems with which it deals, (3) the nature and consequences of the administrative action, (4) the confidence which the agency has won, (5) the degree to which the review would interfere with the agency's functions or burden the courts, (6) the nature of the proceedings before the administrative agency, and similar factors.' These various factors have influenced intensiveness of review in general, and more particularly the choice between the reasonableness test and the rightness test in review of application of legal concepts to established facts."*

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*Davis, supra, p. 552-53.

(3). Nature of administrative decisions:

Further complicating the review process is the nature of the decision made by the agency. There are perhaps six kinds of administrative decisions: formal adjudication under §§ 556 and 557 of the APA or its analogues; trial record rule making under §§ 556 and 557; informal rule making under § 553; interpretative rule announcements as exempted from § 553 procedures; informal adjudication, an "amorphous and miscellaneous category constituting 'the vast bulk of administrative adjudication'"* primarily characterized by the lack of a formal record; and finally internal rule making or "rules of agency organization, procedure or practice" (APA § 553(b)(A) exempted from rule making procedure).

To expand on this slightly:

a) Formal adjudication in accordance with §§ 556 and 557 of the APA (original §§ 7 and 8) or an analogous section particular to some act is most like a trial in a court and the review is similar with deference paid (though the substantial evidence test) to the agency's expertise much as it is paid to a jury's special "expertise";

b) Formal trial record rule making in accordance with § 556 and 557 with review being similar to that of adjudication is an unusual and generally not preferred method of rule making since notice is limited to specific affected parties and is not given in the federal register and formal trial hearings designed to establish adjudicative facts (i.e., facts about discreet past events) are ill designed to develop the broader legislative facts (i.e., facts about general conditions on which to project future conditions which the rules will govern) usually necessary to rule making; such rule making obtains as an exception to the less formal requirements of § 553 of the APA only where a statute expressly calls for it, such as in the Food, Drug and Cosmetic Act and in much ratemaking. Ratemaking although prospective and early on characterized by Justice Holmes as legislative** applies to an often large, but usually identifiable, group of people (including entities) and involves very particularized fact finding about the economics of an industry or transportation enterprise. It is a fit subject for formal rule making.

c) "Informal" rule making is perhaps a misleading phrase. It is the most appropriate and the judicially preferred method of rule making when that rule making is truly legislative in nature. Section 553 of the APA (§ 4 of original) sets out the so called "informal procedures" required for most rule making--called "notice and comment" proceedings. Review of such rule making is not subject to the substantial evidence test but "may be invalidated by a reviewing court under the 'arbitrary or capricious' standard if they are not rational and based on consideration of the relevant factors." F.C.C. v. National Citizens Com. for Broadcasting, 98 S.Ct. 2096, 2116 (1978). In fact the substantial evidence test and the "arbitrary and capricious" standard are two formulations for different contexts (as we shall see below) of what is intuitively the same rationality test and as a practical matter it makes next to no difference which formulation is used. See comment of Friendly, J., in Associated Industries of N.Y.S. Inc. v. Dept. of Labor, 487 F.2d 349-50 (2d Cir. 1973).

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*Currie and Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Col. L. Rev. 1, 54 (1975).

**Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908).

d) Interpretive rule making is exempted from notice and comment procedures. But drawing the line between "interpretative rule making" and "legislative rule making" is not easy. The distinction is important. If a rule is labeled "interpretative" the courts will use a rightness test in reviewing it; if labeled legislative a reasonableness test will be used. In Morton v. Ruiz, 415 U.S. 199 (1974), the court seems to say that even if the agency is granted power to make a rule, which would be legislative rule making, if it chooses to forego the § 553 rule making procedure, then the agency's own implicit characterization of the rule as "interpretative" allows the reviewing court to pay little deference to the administrative judgment, i.e., the court will treat it as interpretative, therefore a question of law, and therefore subject to the rightness test.

e) Informal adjudicative decisions do not furnish an adequate record for review and even though a particular decision must be given substantial deference, no review is possible sans a record. Therefore, the reviewing court may require new evidence to be taken or a record constructed. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). This may call for review in the district court which automatically adds another layer of review to the process. See Currie and Goodman, supra, at 59-61.

f) Internal rules of procedure, etc., are generally only reviewable in conjunction with the review of some substantive rule or order. Generally the A.P.A. prescribed rules in § 553, § 556 and § 557 are the minimum which Congress requires of an agency although an agency may evolve more elaborate procedures if it wishes. The review of the adequacy of, or adherence to, such additional procedures is quite limited. See Vermont Yankee Nuclear Power v. Natural Res. D.C., 98 S.Ct. 1197, 1202 (1978) as to 5 U.S.C. § 553 "notice & comment" procedures.

(4). The articulated standards of review:

Conceptually there are but four standards of review which all the various formulations fall within. From highest to lowest: a) wrong, b) clearly erroneous, c) unreasonable, d) bad faith; if put slightly differently they sound like differences in degree not kind: a) wrong, b) clearly wrong, c) extremely wrong, d) absurdly wrong.

The first is the standard used for purely legal judgments, i.e., when the trial tribunal is plainly "on the way down" from policy and not within an area designated by the primary policy maker for making secondary policy. It is the rightness test discussed above under (2) "Law fact confluence and dichotomy". The reviewing court will substitute its judgment as to the correct or "right" interpretation of the law even in a close case, a case where the judgment of the trial tribunal was perfectly reasonable or plausible. The A.P.A. (5 U.S.C. § 706) "Scope of Review" says "the reviewing court shall decide all relevant questions of law . . . ." Even here though some deference is often paid administrative interpretation, especially if long standing. See Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) and Morton v. Ruiz, supra, at 1075.

The second test, "clearly erroneous", or "against the manifest weight of the evidence", is applied mostly to inferences on "the way up", so called factual inferences. It is a kind of rightness test (i.e., substitution of judgment test) for factual inferences, but the "cold record" is supposed to dictate some deference to the initial fact finder. In other words a reviewer must think this judgment looking at all the evidence is not just wrong (though reasonable) but plainly so.

It is seldom used in reviewing administrative action. In the federal system it is used on review of a trial court's (sans jury) findings of fact. This was the traditional review "on questions of law and fact" of equity courts which always sat (still do) without a jury. In state courts the verbal formulation is "review on questions of law and fact" (if appeal is made from an equity decree, e.g., an injunction or declaratory judgment) or against the manifest (or clear) weight of the evidence if from a jury verdict. If the latter, a new trial is ordered rather than a substitution of judgment. Although these tests are seldom appropriate for, or authorized for judicial review of administrative action, state courts sometimes confuse the manifest weight test with the substantial evidence test. See below in D(2) the Illinois cases and the Ohio case of Chester Township v. Power Siting Commission, 49 Ohio St. 2d 231 (1977).

The third test is reasonableness. The reasonableness standard of review is used in two general contexts: review of the rules produced by administrative rule making and review of the finding of facts of an adjudication by an agency or a jury. In the former context it is often called "review for action that is arbitrary, capricious or an abuse of discretion." In the latter context it is usually called a "substantial evidence" or "substantial evidence on the record as a whole" test. No matter what the name they are both essentially reasonableness tests. They do vary slightly.

In the context of rule making, the initial agency action under review was "going down" from policy in a context in which the agency was authorized (expressly or impliedly) to gather more "legislative facts" in order to particularize the general legal standard set by the legislature into "rules". Judgment must be used in transforming general standards into particular rules. Judgment both as to the "meaning" of the newly gathered legislative facts and as to the "meaning" of the general standards set by the legislature in light of those facts. A reviewing court is not to substitute its judgment for that of the agency. It is to determine only the "reasonableness" of the judgment. No doubt more deference is given by courts to the interpretation of the legislative facts than to the interpretation of the policy to which it is wed. Administrative agencies are credited with expertise at interpreting the data (legislative facts) of their particular subject of regulation and at interpreting the general legislative standard. But courts are also supposed to be experts at the latter. Therefore, when the rule making judgment can be separated into data interpretation versus standard interpretation less deference is paid the latter judgment than the former. See Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944).

In the context of adjudicative fact finding, the initial agency (or jury) action under review was "coming up" from the concrete facts all the evidence for which is contained in a formal record. The judgment under review was based in large part on inferences made from the words in the "cold record". It seems natural in this context to frame the reasonableness test in terms of substantiality of evidenciary support in the record for any finding of fact. In this context, arguments as to the reasonableness of the inference of fact can be somewhat tighter than in the rule making context since specific parts of the record can be referred to and thus logical progression to the inference more clearly demonstrated. Perhaps it is this ability to demonstrate with greater clarity from the relatively simple and clearly finite record of an adjudicative proceeding the reasonableness vel non of the inference of an adjudicative fact that induces courts to talk as if the substantial evidence test is a more stringent test of review than the "arbitrary and capricious test" which is used where the record is more complex and open-ended such as with § 553 "notice and comment" proceedings for rule making.

State courts sometimes formulate the test in the adjudicative fact context as "reasonable minds could reach but one conclusion from the evidence and that conclusion is contrary to the jury verdict". Or "there is insufficient evidence to support the jury finding of (say) negligence and therefore there is no negligence as a matter of law". State courts make this kind of factual review when the appeal is on questions of law only. Hence the phrase "the facts are such and such as a matter of law".

The bad faith standard is seldom used; but, it, or something like it, might be used to review an administrative decision where all review is statutorily foreclosed. A court might say "no evidence supports the decision" or "the judgment is not only unreasonable but so clearly unreasonable that it could not have been made honestly".

Contemporaneously with one of the four reviews adumbrated above, the courts generally review one other aspect of agency action: the process used by the agency to reach its decision. This non-substantive review seeks answers to three questions: was the correct statutorily prescribed procedure used; does that procedure satisfy constitutional requirements; and did the agency follow its own self-prescribed procedures. In *Vermont Yankee Nuclear Power v. Nat. Resources D.C.*, *supra*, the Court said procedures beyond those statutorily prescribed are *not required* (absent some constitutional defect in the procedure, which is rare). Of course, once the agency prescribes for itself procedures beyond those statutorily dictated, it must follow them or run the risk of a reviewing court raising its judicial eyebrow and remanding. This is especially true in cases where the court has substantial doubts about the substance of the agency action under review. See *Citizens to Preserve Overton Park v. Volpe*, *supra*. In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) the court held that rules made in an adjudicative hearing and not according to the procedures set out in 5 U.S.C. § 553 for rule making were invalid. In that case the NLRB had promulgated a rule that a company has a duty to furnish a list of names and addresses of employees eligible to vote in a prospective election as to which union or none would be the employees exclusive bargaining representative. But the Board did not follow the rule making procedure prescribed by Congress but used an adjudication plus amicus briefs of "certain interested parties" (employer groups and trade unions) to gather facts and formulate and announce a rule which it then refused to apply to the matter being "adjudicated" but applied it prospectively (30 days hence) only. Wyman-Gordon refused to obey the new rule and was ordered to do so by the Board. The Court declared the rule invalid because A.P.A. procedure was not followed (especially notice through the Federal Register, 5 U.S.C. § 553) but since the Board's order to Wyman-Gordon was itself the product of an adjudicative process (where the disclosure issue was not seriously considered because already decided by the "rule") the order was valid. Apparently the Court felt that the "rule" could have been promulgated in an adjudicative hearing if they would have applied it to the case being adjudicated. Thus remand would be futile because the Board will just pretend it never made the rule and make it anew in Wyman-Gordon and apply it to Wyman-Gordon. Douglas and Harlan dissented thinking that if the Board thought the change was so great that it refused retroactive application then the Board should be bound by its own implicit conclusion that this was a subject fit only for rule making. See Justice Harlan's opinion. Moreover, Douglas and Harlan reasoned, if the agency gets more input as to the rule's wisdom by giving the broader notice required by APA, maybe it will reject or at least modify the rule. Apparently the plurality (of four) did not think such change likely enough to be worth the delay, or that there was actual unfair surprise to Wyman-Gordon.

In *NLRB v. Bell*, 416 U.S. 267 (1974) the Court made clear that "the Board is not *precluded from* announcing new principles in an adjudicative proceeding and that the choice between rule making and adjudication lies in the first instance within the Board's discretion and would only be reversed for abuse. The Board's judgment on this is "entitled to great weight".

C. Standing to Sue:

Standing is no longer much of a problem for the would-be litigant, i.e., it is no longer much of a barrier to judicial review. The legislative act may seek to limit review but the persistent will find some court, somewhere, to listen. The best bet is to limit the process to one court in one proceeding. All that the APA (5 U.S.C. § 702) requires for standing is (1) (a) injury in fact, i.e., immediate, not remote; concrete, not abstract; particular to plaintiff even if plaintiff is one of a large class with such injury as long as plaintiff's interest is not undifferentiated from that of all other citizens and (b) there is a "substantial likelihood" that such injury will be redressed by the relief sought; (2) the interest plaintiff seeks to protect is "arguably" within the "zone of interests" protected by the statute administrative implementation of which is being challenged. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) found injury in fact to 40 individuals within "close proximity" to the planned nuclear power plant who suffered "environmental and aesthetic consequences of the thermal pollution of two lakes" near the proposed plant, lakes used for recreation. Moreover, "the emission of non-natural radiation into appellees' (the 40 people) environment would also seem a direct and present injury given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants". (at 2631) The Court found there was "substantial likelihood" that the relief requested (holding unconstitutional the $560 million limitation on liability for nuclear accidents) would redress the above injury because corporate officials of the electrical industry had in testimony before the Joint Committee on Atomic Energy in 1956-57 "expressed a categorical unwillingness to participate in the development of nuclear power absent the limitations on liability" and "the smaller producers of component parts and architects and engineers" considered the liability limitation a "critical variable" in going ahead with nuclear power. Therefore, if the limitation is declared to be unconstitutional there is a substantial likelihood the plant would not be built and the threatened thermal and radiant injuries are thus avoided. See also Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (relationship found) and Warth v. Seldin, 422 U.S. 490 (1975) (no relationship found). (Note: on the merits the Court declared the limitation on liability from a nuclear accident not to be unconstitutional.)

In Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970), Data Processing was found "arguably within the zone of interests" protested by a banking statute limiting bank service corporations to performance of bank services for banks, a requirement obviously designed to protect customers of the bank. Data Processing's interest was that of a competitor. Obviously "arguably" means "barely arguably" and this is a very low hurdle for the would-be plaintiff to leap.

D. Potential for the Efficient Utilization of Judicial Review in the Interstate Coordination of Power Plant Siting:

It is probably obvious even from the brief summary above, that judicial review is a complex, multifaceted and most uncertain decision making process. What is not so obvious from the above is the time consuming nature of the process. The entire process is full of pleadings, then motions, then hearings, then briefs and perhaps more hearings, interlocatory appeals (an appeal to a higher court in the middle of the trial process), then finally decision making by the court with the court accountable essentially to no one if its deliberation is inordinately slow. "Inordinately slow" means more than one year (after all the hearings, briefs, etc.), while ordinary deliberation will take anywhere from two months to a year,* either one or two layers of appeal on top of that plus petitions for rehearing or hearing on banc (by all the judges of the circuit), then remands, etc. All very time consuming. Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) was the culmination of some eleven years of administrative hearings and judicial review and still was not over. The Supreme Court is acutely aware of the law's delay** being inordinately great and especially critical in the area of energy development/environmental impact regulation. It delivered a stingy rebuke of the Court of Appeals' review methods and attitude in Vermont Yankee:

> "To say that the Court of Appeals' final reason for remand is insubstantial is at best a gross understatement. Consumer Power [companion case to Vermont Yankee] first applied in 1969 [Vermont Yankee] in 1967 for a construction permit. The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years. The actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque. Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the states within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function. NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural . . . . It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this court would have reached had they been members of the decision making unit of the agency. Administrative decisions should be set aside in this context as in every other, only for substantial procedural and substantive reasons as mandated by statute . . . ."

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*I have done no systematic study of this and know of none. But a glance through several volumes of Federal 2d, the reports of United States Courts of Appeals, seems to confirm this figure, since it gives argued dates and decision dates. See, for example, Central Iowa Power v. Fed. Energy Reg. Comm., 606 F.2d 1156 (D.C. Cir. 1979), argued November 30, 1978, decided July 9, 1979.

**The "law's delay" is of ancient lineage being, you will recall, one of the litany of things Shakespeare's Hamlet would not bear but that after death "dreams may come". Act III, sc. 1.

(1). Channeling judicial review:

Efforts to channel judicial review have been more successful than efforts to limit the scope of review. (See Vermont Yankee quotation above and discussion below.) "Channeling" means to mandate legislatively a certain court (or courts) as the exclusive review point of agency action. The Ohio Power Siting Law (§ 4906.01 et seq. Ohio Revised Code) specifically channels the review of power siting commission decisions to the Ohio Supreme Court. In fact the Ohio Public Utility Act has channelled review of utility rate making decisions to the Ohio Supreme Court for over forty years. The Ohio Act (§ 4903.12) reads:

> "No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission (now also the Power Siting Commission) or enjoin, restrain or Interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court."

The Ohio Supreme Court has consistently adhered to this mandate. See, for example, State ex rel. Columbia Gas of Ohio v. Kiroff, 46 O.S.2d 397, 348 N.E.2d 705 (1976). Because in Ohio there are two courts below the Supreme Court (courts of common pleas (trial) and district courts of appeals) that might presume to review under common law notions of jurisdiction to review, this channeling is a significant savings in time and energy.

The federal judicial system is likewise three tiered. Again Congress has attempted to channel review of most agency action through the Courts of Appeals (thus skipping the first tier) and especially through the United States Court of Appeals for the District of Columbia. See United States Code § 42 U.S.C. 7607(b)(1) of the Clean Air Act, where rule making is channelled through the D.C. circuit, while adjudicative type rulings or other decisions that are "locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit". But the act in § 7604 provides for "citizens suits" whereby "a person may commence a civil action in United States District Court (first tier) where the pollution occurs on his own behalf--(1) against violators (including federal and state governmental units) of emission standards, (2) against the administrator of EPA for failure to perform non-discretionary acts and (3) "against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required . . . (relating to significant deterioration of air quality) or (relating to non-attainment) or who is alleged to be in violation of any condition of such permit. This private enforcement provision is not an authorization of judicial review but it can result in significant entanglement of the courts in the administrative process (the public enforcement of such standards). Congress apparently felt such private actions essential to strict Clean Air Act enforcement even though such private enforcement is a rare exception to the usual rule of public agency (prosecutors, attorneys general, administrative agencies) enforcement of public laws.

An Illinois act is example of the lack of total success of confining judicial review to a single statutorily prescribed procedure. The Illinois Administrative Review Act provides: "This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof." Ill. Rev. Stat., c. 110, § 265 (1973).* (Emphasis added.) Apparently, however, "any other . . . mode of review shall not be employed" is not clear enough in the hands of judicial interpreters bent on "justice". At first, in People ex rel. Chicago & Northwestern Ry. v. Hulman, 31 Ill. 2d 166, 201 N.E.2d 103 (1964), the Court said: "It has become firmly established that where an act creating or conferring power on an administrative agency expressly designates that judicial review will be accomplished under the Administrative Review Act the employment of preexisting methods of securing judicial review is prohibited". 31 Ill. 2d at 169, 201 N.E.2d at 105. But in People ex rel. Dickey v. White, 204 N.E.2d 170 (Ill. App. 1965), the Court concluded that this sweeping dictum did not preclude a petition for mandamus to compel the Director of the Department of Registration and Education to issue a plumber's license which he had, according to the allegations of the petition, refused to issue arbitrarily and without warrant of law, even though the Plumbing License Law provided: "All final administrative decisions of the Director hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Act". The petition further alleged that petitioner had filed an application which was approved by the Department, and had paid the required fee. Under the circumstances, said the Court: "Nothing remains for the Director but to perform the perfunctory and ministerial function in issuing and delivering the license . . . . Under the facts in this record, the refusal to issue the license was not a 'final administrative decision' . . ." 204 N.E.2d at 172. For later decisions to the same effect, see Chestnut v. Lodge, 34 Ill. 2d 567, 216 N.E.2d 799 (1966); People ex rel. Peterson v. Valencik, 266 N.E.2d 752 (Ill. App. 1970).**

Moreover, the United States Supreme Court has also found ways to circumvent efforts to channel judicial review. In the remarkable case of Adams Wrecking Co. v. United States, 98 S.Ct. 566 (1978) where the Court frustrated Congressional efforts to channel and expedite judicial review of administrative rule making by labeling a regulation designed to cut down asbestos dust caused by building razing as far as possible as not an "emission standard" but a "work practice standard" thus outside review immunity. ("Emission standards" promulgated by EPA cannot be reviewed except through an expedited review by the D.C. Circuit Court of Appeals.) On review, outside the Congressionally prescribed channel, the Court found the asbestos dust standard void.

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*To the Administrative Review Act, Illinois has since added the Administrative Procedure Act, Pub. Act 79-1083, Sept. 22, 1975, establishing procedures for both rule making and the decision of contested cases.

**Jaffe and Nathanson, Administrative Law, Cases and Materials, pp. 748-49 (1976).

(2). Limiting the scope of review:

While channeling review through certain courts is essential, limiting its scope is equally important to administrative efficiency. But such limitations have met with mixed success. The frustration the Supreme Court sometimes feels in limiting the lower courts to the legislatively mandated standards is evidenced by the unusually strong admonition quoted above from the Vermont Yankee case.

Efforts to eliminate judicial review completely have likewise met with mixed success, although the Supreme Court usually pays lip service to the notion that Congress can grant as much or as little review as Congress deems proper. See Estep v. United States, 327 U.S. 114, 120 (1946). There the Court said: "And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses."

The classic example of a statute which explicitly precludes review is the provision of the Veterans' Benefits Act that, with certain exceptions, "the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." 38 U.S.C. § 211(a). Barefield v. Byrd, 320 F.2d 455 (5th Cir. 1963), reviewed and followed the many cases holding that this provision effectively precludes judicial review of even the most arbitrary action. Barefield v. Byrd also rejects the contention that the APA at least permits judicial review to enforce its own procedural guarantees of fair administrative hearing on the ground that those guarantees are themselves inapplicable to administrative proceedings under the Veterans' Benefits Act, which are also left entirely to the discretion of the Administrator. The constitutional theory upon which the decisions are based is that these are gratuities which Congress may grant or withhold upon such conditions as it sees fit. For a full-dress attack upon the validity of this theory see Davis, Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government, 39 Ind. L.J. 183 (1964). The closest that the Supreme Court has come to ruling explicitly on the no-review clause of the Veterans' Benefits Act was to hold in Johnson v. Robison, 415 U.S. 361 (1974), that it did not apply to challenges to the constitutionality of the legislation itself, such as the provision excluding from educational benefits conscientious objectors who performed the required alternative civilian service.

In Jaffe and Nathanson, Administrative Law, Case and Materials, 4th ed. pp. 949-51 (1976), using Illinois as an example, the editors show with specificity the difficulty courts have with standards of review and the uncertainty and confusion, i.e., regulatory inefficiency, caused thereby.

The confusion between "standards of proof" and "standards of review" that is manifested in Jaffe and Nathanson's example was compounded by the wording of the review standard--"questions of fact shall be held to be prima facie true and correct". "Prima facie" is a term often used in standards of proof to denote the point at which the burden of going forward with the evidence shifts to the defendant or, put another way, the point at which plaintiff has produced enough evidence to prove the material elements of his claim that, in lawyer's jargon, "will get his case to a jury", i.e., that a jury verdict for plaintiff would be upheld. A jury's verdict will be based on the preponderance of the evidence but it will be upheld if the conclusion that the preponderance of the evidence lies on a certain side, is found by the reviewing court to be reasonable, i.e., there is substantial evidence to support it. The legislature in Illinois probably intended "prima facie" to mean the substantial evidence (reasonableness) test. But there is enough confusion with the substantial evidence test without using terms from a different but cognate field.

The non-lawyer reading this must remember that in most trials to a jury or before an administrative agency there will be substantial evidence on both sides. The trial forum must decide which of two sets of opposite, but substantial, evidence preponderates. If it decides that neither side preponderates, i.e., that it is a standoff, then the side with the burden of proof (read: the side that bears the risk of non-persuasion) loses. Usually the side with the burden of proof in the risk of non-persuasion sense is the plaintiff. If the remedy sought is particularly harsh then a higher standard of proof than a mere preponderance is required. For instance in suits for an injunction or a quasi-criminal administrative remedy (e.g., revocation of a business license because of wrongful conduct) the side seeking the remedy will often be said to be required to have "clear and convincing" evidence. Again both sides might have substantial evidence but the one with the burden of proof must have evidence that is "clear and convincing" and not just "preponderating". Since "clear and convincing" is not a term of comparison, while preponderance is, confusion on review is inevitable.

For reasons that apparently run deep in the American tradition, Congress, state legislatures and the general public seem to trust dispute settlement decisions made by judges more than by quasi-judicial agencies when they involve the application of existing policy and law. Therefore, absolute prohibition of judicial review is not feasible. Moreover, since courts in our constitutional schemes (state and federal) have the last word as to application decisions anyway and since there are legal devices for circumventing such absolute limitations (such as ruling the decision is outside the scope of limitation or is unconstitutional) they likely would be ignored. The best route is to clearly set forth the scope of review and channel it through some expeditious court procedure.

The difference between "wrong", "clearly wrong" and "unreasonable" is slippery even when dryly abstract.* When lubricated by controversial public issues only loosely and tentatively resolved in the political policy making forum, then the difference between "wrong" and "unreasonable" requires a judgment of unusual detachment and restraint. Power siting decision making moves in such an area of tentative, shifting policy, torn between production and environmental protection. Add to this the interstate nature of the environmental and production issues involved and the judicial review of decisions aimed at the interstate coordination of power siting becomes doubly difficult to confine. Only by carefully marked out channels of review with painstaking articulation of standards of review can a judicially created morass undoing the best layed plans of coordination be avoided.

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*See Chester Township v. Power Siting Comm., 49 Ohio St. 2d 231 (1977) for an example of confusing "clearly wrong" with "unreasonable".

(3). Special or ad hoc courts:

One way of channeling and expediting review is to set up special or ad hoc courts. They handle only one kind of case, thus becoming expert at accurately applying the law to the facts in resolving certain kinds of disputes. Moreover, its membership can be picked in the first place with a view to possession of the kind of knowledge and detachment necessary to its special task. Furthermore, in some contexts a special court has other advantages including uniformity of decisional or of precedential law. A few federal courts of this character have been created. See Wright, Law of Federal Courts, 3rd Ed. (1976), § 5, pp. 11-14; § 11, pp. 29-38.

It must be remembered that there are two related but distinct purposes of interstate coordination of power plant development: (1) to optimize the achievement of national goals of production and environmental protection and (2) to avoid or to resolve conflict between states. The first goal can be achieved by techniques ranging from region-wide communication, to joint planning, and ultimately to some dispute resolving forum. The second goal is achieved by the same techniques except that once a dispute has arisen some forum for discussion and negotiation and ultimately authoritative (imposed, if necessary) settlement is required. Courts have been relied on to do this. In interstate dispute settlement either the Supreme Court's original jurisdiction or some federal district court will be used, in the latter case probably relying on the judicial review provisions of the Clean Air Act. If the Supreme Court's original jurisdiction is used, it will nominally be a suit between states. If the district court is used it will nominally be a suit against EPA with state regulatory agencies, private utilities and other private groups joining. The Supreme Court will be reluctant to take an environmental suit of this nature in its original jurisdiction and would likely find that the dispute is really with EPA because EPA technically has authority to resolve it. These disputes will thus be forced into federal district court or a circuit court of appeals. These courts are not expert at environmental or other scientific fact analysis. Moreover the district courts are all identified with the state in which they sit. The judges of the district courts practiced law and often held political office in that state. The circuit courts are similarly identified with the several states their circuits cover. The ORBES states are in four different circuits. Pennsylvania is in the third; West Virginia in the Fourth; Ohio and Kentucky in the Sixth; and Illinois and Indiana in the Seventh. For resolution of ORBES region interstate disputes there is no neutral forum save the United States Supreme Court, whose review will likely be both limited and reluctant.

It can be seen from this that the regular federal court system below the Supreme Court would be far from satisfactory as a neutral forum for resolving interstate power plant siting disputes. Either a special or an ad hoc court could be constituted so as to be above reproach for lack of interstate neutrality. Ideally then in this context a special or ad hoc court might achieve both expertise and neutrality.

Such a special or ad hoc court (the difference between "special" and "ad hoc courts" will be explained below) could be used to review the decisions of any of the several schemes for decision making outlined in the previous sections of this report. They could be used to review a federal siting agency's decisions if such an agency were established. The Temporary Emergency Court of Appeals (TECA) established in 1971, heard all appeals from the federal district courts in cases arising under the Economic Stabilization Act of 1970 and for a time was the appeals court for all federal energy matters as well. (15 U.S.C. § 754(a)(1).) A special court could be used to review an interstate compact agency's decision as to planning or as to actual site permits or any other compact decision Congress might think appropriate for judicial review. Finally such a special federal court could be used to review state power siting decisions at the behest of a sister state, in other words, be a trial court for a special kind of interstate dispute--a role now played exclusively, albeit uncomfortably, by the United States Supreme Court. Review of the decision of any special court could be, and as practical matter, probably should be, available in the Supreme Court. A special compact agency review court or interstate dispute court has never been tried or, as far as this writer knows, even suggested, before. Nonetheless they are legally feasible. How such courts might be constituted therefore is worth further discussion.

Special courts serving any of the three functions just mentioned--review of federal, compact, or state power plant siting--could be constituted in several ways. The theoretical advantages of special courts--expertise with resultant just and efficient dispute resolution--will vary with the manner in which they are constituted. The constitution of a court requires a determination of the manner of selection and the tenure of the judges to sit thereon, and a specification of its jurisdiction, i.e., the disputes it can authoritatively resolve. Incidental to a court, but of some importance are the place it is to sit, administrative support, and the rules for proceeding before it.

Selection and Tenure Options

Here are four ways that judges could be selected and tenured: (1) a permanent Article III court with life tenured judges appointed by the President with the consent of the Senate; (examples: Court of Claims, Court of Customs and Patent Appeals); (2) a permanent Article I court appointed by the President with Senate approval for a term of years (5 or 10, etc.) (example: Tax Court); (3) ad hoc appointments for each case from the existing life tenured federal judiciary by the Chief Justice of the United States (example: Three judge district courts--appointed by Chief Judge of Circuit) or appointed by the judicial panel on multi-district litigation (28 U.S.C. § 1407) (example: Regional Rail Reorganization Panel, 45 U.S.C. § 718(b)); (4) a temporary court hearing cases of a certain kind appointed by the Chief Justice from the life tenured federal judiciary (examples: The Temporary Emergency Court of Appeals (1972 to present), which was modeled on the Emergency Court of Appeals (1942-1953)).* Quite a few other arrangements are possible but they would be permutations of the elements in the above four suggestions. The advantages and disadvantages of any special court in the context of interstate coordination of power plant siting can be adequately canvassed by looking more closely at the four suggested selection and tenure options, for each of which there exists an actual working model.

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*Options (a), (b) and (d) are "special" (i.e., not part of the regular system of) courts but are not "ad hoc" (i.e., picked to hear one case or set of cases). They could have offices, clerks and their own calendar and docket of case. (c) is special and ad hoc but not "very" special since composed of regular federal judges. The only thing special about them is that the judges are picked to hear the particular case in a special way not otherwise provided for in the rules.

(a) A Permanent Article III Court (like the Court of Claims) with Judges Selected by the President with the Consent of the Senate.

The Court of Claims was originally established in 1855. It has a Chief Justice and six associate justices appointed by the President for life. It has nationwide jurisdiction over most claims for money against the federal government. 28 U.S.C. § 1491 et seq. It sits in three judge panels and has 15 trial commissioners who are sent throughout the United States and into foreign countries to hold trial hearings. The Court of Customs and Patent Appeals established in 1909 and the ill-fated Commerce Court established in 1910 are (were) presidentially appointed but unlike the Court of Claims are pure review courts--reviewing (in the case of the CCPA) Customs Court (est. 1926, itself, a special court, 28 U.S.C. 251-255) and the decisions of several patent, trademark and tariff agencies. The Commerce Court was set up to review decisions of the Interstate Commerce Commission, the first big federal regulatory agency. It was always mired in controversy--from fear that it would too much favor the railroads being regulated--and after several Supreme Court reversals seemed to confirm its incompetency, it was abolished by the Wilson administration in 1913. Wright, supra, at 14, concludes:

> "Since 1913 Congress has resisted the many pressures, which continue to this day, for creation of new courts with specialized subject-matter jurisdiction. The history of the Commerce Court may have given rise to a feeling, whether or not justified, that it is more desirable to use judges who hear all types of cases than to create a special tribunal with judges who hear only that kind of case."

This strongly suggests that in courts of law specialization is not viewed as an unmixed blessing. Fear of bias and tunnel vision countervail against the benefits of expertise. Bias is thought to be caused by the nature of acquiring expertise--one becomes an expert at railroad law by representing the railroads; one becomes an expert at utility law by working for the utilities; an expert at environmental law by representing environmental action groups, etc. In addition to this feeling of inherent bias, on one side or the other, of any particular expert, there is the fear that the appointing authority will respond to the pressure of the potential antagonist interest groups whose disputes the Court will resolve to appoint "reasonable" people (read: "friendly") to the court. This latter fear seems unrealistic in a context where there are countervailing interest groups. Such countervailing pressure should keep out those viewed as zealots by one side or the other and tend to moderate the membership. Moreover, in resolving interstate environmental and production issues, a chief concern would be bias for or against one of the antagonist states, a concern easily allayed by appointing people with no connection with any of the antagonist states.

The fear of the inherent bias of expert courts is more difficult to allay. Picking people from the groves of academia might be a way of avoiding "biased" experts--after all ideally the scholar has acquired his expertise in the disinterested pursuit of truth. But some will no doubt claim that the university breeds an ivory-tower bias--the claim that "he may know theory but he doesn't know how things work in the real world". Moreover, a scholar will have published. No matter how neutral or detached this scholarship may appear to the disinterested observer, to the committed with a "your either for me or against me" mentality, neutral is "against". This may suggest that any court picked to resolve disputes between groups identifiable in advance of the picking, will be charged by both sides with bias. If the interstate coordination of power siting were purely a matter of getting states to agree or of resolving conflicts between the states' officials then finding judges whose neutrality was assured would be a simple matter. But other interests than those asserted by the states will play a part in any dispute over power plant siting. Perhaps the fact that such interests are roughly countervailing will, as with the problem of biased selection, cause the screening process to be so thorough that those experts with the least bias would be picked.

The other fear engendered by special court proposals is that the "expert" judges will have tunnel vision or, switching metaphors, the inability to see the forest for the trees about which the court is expert. *See*, Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A.J. 425 (1951); Note, *The Environmental Court Proposal: Requiem, Analysis, and Counterproposal*, 123 U. Pa. L. Rev. 676 (1975); Lenenthal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509 (1974); Oakes, *Developments in Environmental Law*, 3 Env. L. Rep. 50001 (1973); *Report of the President, Acting Through the Attorney General, on the Feasibility of Establishing An Environmental Court System* (1973). Judge Harold Leventhal, of the United States Court of Appeals for the District of Columbia Circuit says in the article cited above that he is skeptical of the proposal for a special environmental court: (at 517-18)

> "Review to ensure balance, coupled with restraint on the part of the reviewer, requires a generalist who can penetrate the scientific explanation underlying a decision just enough to test its soundness. A specialist whose attention was directed exclusively to environmental issues, would tend to intrude his own judgment on the issues, thereby coopting the discretion of the agency."

Moreover, says Judge James Oakes, United States Court of Appeals for the Second Circuit, in his article just cited, specialists are not needed for expertise for the "current system of review by generalist judges already allows for the consideration of the best technical expertise on the various areas of environmental concern". (At 50012.) The Air Quality Subcommittee of the American Bar Association testified that:

> "In the long run we will get better decisions from judges with experience in all areas of law. Environmental judges would not have the impartial viewpoints of district court and circuit judges whose broad experience can be brought to bear on their cases."

Report of the President, etc., supra at II B-10.

Even if the special court were picked from existing "generalist" federal judges as is the Temporary Emergency Court of Appeals, the Note in the U. of Penn. Law Review is still skeptical:

> "While there probably exists a sufficient pool of qualified lawyers to staff a specialized court with generalists initially, the evolution of both the law and the judges is a major concern. If a large majority of the judges time is spent on technical issues, they will almost inevitably lose touch with other areas of the law. Even a court that was full of generalists could become myopic if its judges were exposed to only one corner of the law."

On the other hand there is considerable opinion that special courts need not be feared for tunnel vision: Whitney, The Case for Creating a Special Environmental Court System, 14 Wm. and Mary L. Rev. 473 (1973); Whitney, The Case for Creating A Special Environmental Court System--A Further Comment, 15 Wm. and Mary L. Rev. 33 (1973); H. Friendly, Federal Jurisdiction: A General View, Part VIII, "Patents and Taxes" p. 153 (1972); Ditlow, Judicial Review of Patent Office: A More Rational Review System, 53 J. Pat. Off. Socy. 205 (1971). Judge Henry J. Friendly* of the United States Court of Appeals for the Second Circuit in pleading for a special Patent Court stated:

> "I am unable to perceive why we should not insist on the same level of scientific understanding on the patent bench that clients demand of the patent bar, or why lack of such understanding by the judge should be deemed a precious asset. As Judge Learned Hand well said, 'To judge on our own that this or that new assemblage of old factors was, or was not, 'obvious' is to substitute our ignorance for the acquaintance with the subject of those who were familiar with it.' Such superior competence over the experts of the Patent Office as a judge may possess comes 'not because of his non-expert personality, nor yet because he hears tax cases, bankruptcy cases, and other private litigation, but because he has the advantage of hindsight and of the research of industrious counsel who usually spend far more time on searching the art relating to a particular invention than the Patent Office can afford to devote to any one application.' It is true that, as a distinguished objector to a specialized patent court has said, 'It is hardly to be supposed that the members of a patent court will be so omniscient as to possess specialized skill in chemistry, in electronics, mechanics and in vast fields of discovery yet uncharted.' But a Patent Court, following the model of the Court of Claims, would have a number of commissioners to conduct the trials; they could represent a broad spectrum of scientific knowledge and would

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*Columbia University Press states: "Chief Judge Friendly's interest in federal jurisdiction began as a pupil of Professor Felix Frankfurter. It has continued through the various stages of his career--law clerk to Mr. Justice Brandeis, practitioner before many federal agencies, and judge . . . since 1959. His publications include two books; the 1962 Holmes lectures at the Harvard Law School, The Federal Administrative Agencies: The Need for Better Definition of Standards and Benchmarks (1967)." The book here quoted from was based on the 1972 James S. Carpentier Lectures at Columbia University Law School. Most legal scholars would probably agree that Judge Friendly is one of America's most distinguished sitting judges. This writer's personal feeling is that he is America's greatest living judge.

> be assigned cases in accordance with their individual capabilities. The case would thus come before the Patent Court with detailed findings of fact by a disinterested "judge" expert in the subject-matter. Even though no member of the reviewing court could be expert in all the technologies that would be involved, I do not agree that '[t]he expert in organic chemistry brings no special light to guide him in the decision of a problem relating to radioactivity.' He is still likely to know a good deal more about radioactivity than someone like the writer, whose college specialty was European history and who avoided science courses because of lack of real comprehension. At the very least, such a judge would contribute a scientific approach and an acquaintance with the lingo not possessed by the common run. Furthermore, such a court could have a staff of experts who would be available both to the commissioners and to the judges as law clerks are now." (pp. 157-59)

In discussing a proposed Court of Administrative Appeals, for which he concludes the arguments pro and con are about even, he states (at 185-86):

> "A second advantage asserted for a Court of Administrative Appeals is that it will assure greater expertise both on procedural and on substantive questions. The argument as to the former is unimpressive.
>
> "The possibility of acquiring greater expertise on substantive matters is considerably better. It is often urged that the variety of matters coming before such a court (atomic energy, electricity and gas, air, rail, motor and water transportation, communication by telephone, telegraph, radio and television, securities regulation, unfair labor practices, and many others) would prevent the acquisition of real expertise in any particular area, such as the Court of Appeals for the District of Columbia Circuit has undoubtedly acquired over the years by virtue of its exclusive jurisdiction over appeals from the FCC's licensing decisions. Granting force to this argument, I still think that some gain in substantive expertise would be both possible and highly beneficial. A judge who has gone through even one minimum rate case is better equipped for a second than when he was as a virgin; the third time he will be better still. A proper use of the panel system would allow for further development of expertise; and the court could have a modest size staff of technical experts in the principal areas subject to its jurisdiction. There would thus be a significant gain in expertise on the substantive side."

As to a special environmental court Judge Friendly had this to say (pp. 189-90):

> "Some recent developments have raised the question whether there is need for a specialized administrative review court of much more limited scope. A good deal of the malaise about administrative decisions affecting the environment arises from the fact that the agency is not considered to be truly disinterested. The Federal Power Commission is more concerned with averting another blackout than with the Hudson River fishery; the Federal Highway Administration wants to build highways; the Atomic Energy Commission is interested in the development of atomic power. Hence, even though such an agency has complied with the procedural requirements of the National Environmental Policy Act and has produced a reasoned impact statement, its decision to go ahead is naturally suspect, and there is clamor for judicial review on the merits even in cases where there is

> no administrative record and no explicit statutory provision for review.
>
> "Better solutions should be found. The best would be for Congress to give clearer directions with respect to the ordering of priorities; if it did, judicial review on the issue of compliance with these directions would be appropriate.
>
> "Short of that, one might envision a Board of Review, with members of the highest competence and standing, which, on the basis of the agency's factual findings, would make the ultimate value judgment, at least in cases of truly great importance. Such a Board should assure reasonable uniformity of policy, and, if it were placed in the White House, the line of responsibility would be clear. Some of the problems are obvious--further delay, in some instances a second-guessing of a 'quasi-judicial' agency, the difficulty in disentangling environmental from other considerations, the dangers of pressure and of poor appointments--but these are not beyond reasonable cure if the will exists and we can hardly expect perfection in so controversial a field. Certainly it is better that value judgments of the sort here at issue should be made by appointees of the President, having the aid of an expert staff, than by random panels of federal judges, each with his own biases on such matters and none having access to disinterested sources of information.
>
> "However, if the enthusiasm for the federal judiciary's taking over the running of the country should thrust this task also on the courts, it might be better to have a Court of Environmental Appeals than to leave such decisions to the general courts. This would avoid the evils of random choice of judges, with consequent lack of decisional uniformity, and would give the court the assistance of an expert staff. In short, if instead of a Board of Review such as I have outlined, we must have substantive judicial review, perhaps it should be by a specialized court."

From the above it is obvious that the "wisdom" of special courts is a matter of much controversy. In the "pure" special court of the first alternative (Article III, life-tenured judges, no other jurisdiction) both the advantages and disadvantages referred to above are present in greatest measure. The advantages: the judges may be picked initially for their expertise and by concentrating on one subject matter of dispute, the expertise deepens. They can be picked initially for their neutrality and their life-tenure guarantees their independence from biasing influences. The disadvantages: the judges may develop "tunnel-vision", focusing on the too narrow issues with which their expertise qualifies them especially to deal and neglecting the larger social and legal milieu in which the disputes arise. Moreover, life-tenured judges who prove not to have the capacity of detached and neutral expertness for which chosen, may not be removed. The three alternative ways for constituting special or ad hoc courts have these advantages and disadvantages in lesser proportion which we will briefly discuss.

(b) An "Article I" Court with Judges Appointed for a Term of Years.

Congress is constitutionally empowered to create judicial tribunals "as necessary and proper to carrying into execution" the "Powers vested by this Constitution in the Government of the United States." (U.S. Const. art. I, § 8.) A court created as necessary and proper to Article I powers (e.g., the commerce power, compact clause power) and not pursuant to Article III power (i.e., the "judicial power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish") need not be composed of life-tenured judges as mandated by Article III. The United States Tax Court (26 U.S.C. § 7441, as amended in 1969 by Pub. L. 91-172, § 951, 83 Statutes 487) is an Article I court. Administrative Law Judges (formerly called hearing examiners) although not members of a specific court are Article I judges. (5 U.S.C. §§ 1305, 5372, 3344, 7521 as amended by Pub. L. 95-251, 92 Statutes 183.)

Article I courts are sometimes called "legislative" as opposed to the name "constitutional" given Article III courts. Some controversy has obtained over the years as to the status of, and relationship between "constitutional courts" and "legislative courts." (See Palmore v. United States, 411 U.S. 389 (1973); National Mut. Ins. Co. of District of Columbia v. Tidewater Transfer Co., 337 U.S. 582 (1949); Wright, Federal Courts, 3rd Ed., § 11, pp. 29-38 (1976).) It is fairly clear, however, that an Article I court could be established to review disputes growing out of a federal administration of power plant siting, or of compact administration of power plant siting. Whether such a court could be established to settle disputes between states over power plant siting where no federal or compact agency is involved is more problematic. In any event, most of the advantages and disadvantages of an Article III court obtain for an Article I court except that an Article I court may be less independent of political influence, but could be created on a limited term basis.

(c) Ad Hoc Appointment of a Panel of Judges from the Existing Life-Tenured Federal Judiciary to Hear Individual Disputes.

In the limited context of settling conflicts between states over environmental and energy issues in the allowance of the siting of new power facilities to be built by private utilities the judges should be (1) disinterested as to environmental-energy policy issues, (2) neutral with regard to the states involved and (3) capable of understanding the complex scientific data involved. Picking special court judges from the sitting federal life-tenured judges could possibly get the most competent court based on those three requirements. Using the three judge court model,* whereby a panel of three judges is picked by the chief judge of the circuit from the active and senior district court and circuit court judge of the circuit to hear a single case, a new special kind of three judge panel could be constituted. The Chief Justice of the United States, not the chief judge of circuit, would pick judges from the existing life-tenured federal judges but none could be from the district or circuit wherein the case is brought or from a district or circuit which is in one of the contending states in the lawsuit. It would be assumed that the Chief Justice would also pick judges that are competent to deal with the factual and legal issues involved. Such a court should be disinterested as to the environmental-energy policy issues since the judges are life-tenured, should be above reproach as to neutrality toward the states involved, and should be somewhat more expert at dealing with the scientific and technical data than a purely randomly picked regular federal court. Such a court is still a "generalist" court free of the tunnel-vision taint. On the other hand, since any particular court will only hear one case, the court would lack the advantage a special court might have of acquiring expertise from hearing the same kind of case over and over, which brings us to the fourth kind of special or ad hoc court.

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*28 U.S.C. § 2284 was amended to eliminate three judges courts except in legislative reapportionment cases and with certain cases under the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Presidential Election Campaign Fund Act, 26 U.S.C. § 9011(b)(2).

(d) A Temporary Court with Special Jurisdiction Appointed from the Ranks of the Life-Tenured Federal Judiciary.

An alternative that might achieve that expertise from repetition that ad hoc appointment lacks would be a court modeled after the Temporary Emergency Court of Appeals (TECA). TECA was originally made-up of nine judges--six circuit and three district court judges--who were appointed in January, 1972, by the Chief Justice pursuant to the Economic Stabilization Act Amendments of 1971 (Public Law No. 92-210, § 2). The court usually sits and decides in three judge panels. The principal location of TECA is the District of Columbia, but the courts hear cases in other places as the Chief Judge of TECA designates. The Court operates under its own rules. It is strictly an appellate court hearing appeals from the federal district courts. Such a perpetual (if not permanent) court has offices and staff unlike the ad hoc three judge courts just mentioned. Such staff could supply some of the expertise to allow more competent and swifter disposition of cases. On the other hand it is subject to attack for tunnel-vision and other bias. "Just as agencies may be 'captured' by the industries which they are charged with regulating, a specialized court such as the TECA may become a passive partner with the agencies it reviews." Elkins, The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility, 1978 Duke L. Rev. 113, 151. My own reading of TECA cases leaves me unconvinced that this charge is true. Rather the court has taken seriously and understands that the reasonableness standard does not allow it to substitute judgment for the reviewing agency. They are doing what the Supreme Court in the Vermont Yankee Case quoted earlier admonished review courts to do.

CHAPTER V: PRIVATE PLANNING AND COORDINATION

Section 8: The Use of Electric Utility Industry Regional and National Organizations to Effect Interstate Coordination of Power Plant Siting.

There has been substantial interstate coordination of the electrical utility industry by the industry itself under the general oversight of the Federal Power Commission (FPC) and its successor, the Federal Energy Regulator Commission. In fact, the only coordination in the industry has been by the private sector under federal supervision. This coordinative effort, however, has not extended to plant siting or development. As indicated in previous sections, plant siting is regulated by the individual states implementing local, state and federal policies with no interstate coordination. Likewise, the retail sale of electricity is controlled by the individual states.

In the vast area between plant siting and retail delivery lies the nationwide system of wholesale transmission called by the industry the "North American bulk power systems". It is under the regulatory authority of the Federal Energy Regulatory Commission (FERC). FERC in turn, has, consistent with its original Congressional mandate, relied on the voluntary coordination of private utilities. (See Section 2, above.) This voluntary or private coordination of the nonsiting aspects of the interstate electrical industry has been quite extensive. The National Electrical Reliability Council (NERC), the organization with the overall responsibility for this private coordination declared (in the 8th Annual Review of overall reliability and adequacy of the North American Bulk Power Systems, August, 1978, p. 3):

> "The existing bulk power transmission system in North America consists of several highly-developed networks, interconnecting essentially all utilities in the United States and Canada. The inherent strength and capability of these networks have been demonstrated repeatedly. It is essential that these networks be strengthened and expanded continually as electric production and use grow, and as technology advances. However, siting, regulatory, and financial constraints make it much more difficult to provide the transmission capacity to meet the anticipated power requirements. This will result in degradation of power supply reliability."

NERC's stated purpose is "further to augment the RELIABILITY and ADEQUACY of bulk power supply in the electric utility systems of North America" (from inside cover of 8th Annual Review).

The question then is can this demonstrated capacity for coordination by the private sector be utilized for new tasks with expanded purposes. The new task would be interstate coordination of power plant siting. The expanded purposes are not foreign to present coordinative effort by the industry but would have to receive a new emphasis so as to be equal with reliability and adequacy. "Efficiency" (or minimizing cost) is a production goal well within the private sector's ken. But three non-production oriented purposes are not so naturally with the private sector's ken: environmental protection, energy resource utilization, and a fair (and perceived as fair) allocation of the benefits and burdens of siting among the states. The industry is quite familiar with the first two of these non-production purposes of coordination. The last is a purely political purpose probably not a present concern of the industry. These non-production purposes might seem at odds from a producer's perspective with the goals of efficient production of a reliable and adequate supply of electricity. Suitability of a site for efficient production and its compatibility with the broad range of environmental/energy resource goals are often at odds and one would expect the private utility to opt for production suitability.

However, if the final balancing of suitability and compatibility interests is left to public decision-makers, private utilities superior technical knowledge and incentives might be utilized to fashion long-range comprehensive interstate regional plans for power generating facility and transmission development. There would need to be public-established criteria for the private industrial planning. The plans could then be the basis for expeditious and final public choices. This publicly guided and mandated private planning might also be publicly funded.

In order to examine this option for interstate coordination of power siting this report will take a brief look at the existing organizations within the private sector, their present structure and operation and their potential for comprehensive industry-wide regional planning. A brief review of the antitrust law implications of such private planning will then be made. Finally some public control options will be suggested. The ultimate picture would be roughly (1) the public establishment of planning criteria, (2) comprehensive private planning, (3) expeditious final public approval of the planning including making choices among planning options and (4) regulation-free private action in accordance with the plan.

A. National Electrical Reliability Council and the Regional Councils:

Introduction--Numerous Studies

Since the Federal Power Commission's 1964 National Power Survey, there have been a raft of studies both public and private concerning the future of the electrical utility industry, many with a special concern for facility siting in all its complexity. Four articles based in large part on the various studies are here drawn on to give an overview of the private sectors activity: (1) Nassikas, Centralizing Decisional Authority, 24 Adm. L. Rev. 15 (1972). John N. Nassikas, when he wrote this article, was chairman of the F.P.C., by appointment of President Nixon. Nassikas was an outspoken opponent of some of the proposals for a federal siting act, (although he said "Absent state or regional implementation (of a national standard for certification), I recommend federal certification." (Id. at 26.)) and a proponent of private utility planning. (2) Journey, Power Plant Siting--A Road Map of the Problem, 48 Notre Dame L. 273 (Dec. 1972). Drexel D. Journey was Deputy General Counsel of the Federal Power Commission when he wrote this article which is a functional analysis of plant siting legislation introduced into Congress in 1971 and 1972. (3) Doub, Federal Energy Regulation--Toward a Better Way, 60 A.B.A.J. 920 (1974). William O. Doub, wrote this short article as a précis of the report of the Federal Energy Regulation Study Team of which he was chairman. He was a commissioner of the Atomic Energy Commission (now NRC). The "Team's" report was entitled Federal Energy Regulation: An Organizational Study. (1974). The Report concluded: (Id. at 922.)

> "Direct federal pre-emption of siting and licensing was not deemed advisable at this time--in part because philosophical resentment against that step would likely be strong, but primarily because it could diminish important state powers and initiative in the planning field and because state and local groups are ordinarily much better equipped to evaluate such items as local ecology, aesthetic standards, and compatibility with surrounding land uses. Nevertheless, the report admitted the harsh reality that federal pre-emption may become necessary at some future date if the as yet untried co-ordinating efforts fail to satisfy regional and national needs for certain critical energy facilities because of narrower geographical interests."

(4) Breyer and MacAvoy, The Federal Power Commission and the Co-ordination Problem in the Electrical Utility Industry, 46 S. Cal. L. Rev. 661 (1973) was cited previously in Section 2. Stephen Breyer is a law professor and Paul MacAvoy is an economist. They maintain there are three major problems confronting the electricity industry--reliability, environmental protection, and efficiency. Their article discusses the third of these:

> "the need for an efficient system of production--a system that produces and transmits the electricity demanded at the lowest cost. This discussion will suggest that increased coordination among electricity producers can lower production costs while simultaneously allowing a given expenditure for electricity to purchase more reliability or more environmental protection . . . . While this Article will discuss the coordination problem, its major purpose is to evaluate the ability of a regulatory agency to plan in a technologically complex industry." (Id.)

They conclude that the Federal Power Commission (now FERC) cannot plan and has been a failure at coordinating the industry for efficiency.

> "It has been suggested that the causes of this failure include not only a possible lack of some statutory authority, but also *the practical difficulties involved in having regulators make complex managerial decisions and the impossibility of giving private managers incentives that would lead them to make decisions more to the regulators' liking*. The causes include the tendency of the agency to try to respond to problems incrementally as they arise, rather than to devote significant efforts to long-range planning. Thus, the need to rationalize the industry remains." (*Id.*) (Emphasis added.)

Breyer and MacAvoy suggest that public debate must now focus on "the major alternatives to regulation." Unfortunately they suggest only two alternatives--consolidation of the industry by mergers into 10 to 15 large, privately-owned companies and creation of an industry consisting of 15 to 25 large production companies owned and controlled at least in part by the government--and reject them both. They then conclude simply "that, if the nation is to obtain the benefits of rationalized planning, it must seek alternatives". (*Id.*) More recently Breyer wrote *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform*, 92 Harv. L. Rev. 549 (1979) also cited above. The above articles will be cited by name of author and page in the following review of NERC.

History Of Private Planning--General

Since the inception of federal regulation Congress has had confidence in the coordinative capacity of the private utilities. Section 202(a) of the Federal Power Act of 1935 stated that the FPC, acting through *persuasion* and *voluntary* industry responses, is to secure such construction, interconnection and coordination of electric utility facilities throughout the nation as will assure ". . . an abundant supply of electric energy . . . with the greatest possible economy and with regard to the proper utilization and conservation of natural resources . . . ." Notice that "adequacy," "efficiency," and resource "conservation" are specifically aimed for, while reliability and environmental impact are not mentioned specifically although the words "proper conservation of natural resources" does hint at environmental concern. The Senate Report accompanying the Act explained further:

> "Under this subsection the Commission would have authority to work out *the ideal utility map* of the country and *supervise the development of the industry* toward that ideal. The Committee is confident that *enlightened self-interest will lead the utilities to cooperate* with the Commission and with each other in bringing about *the economies* which can alone be secured *through the planned coordination* which has long been advocated by the most able and progressive thinkers on this subject." S. Rep. No. 621, 74th Cong., 1st Sess. 49 (1935). (Emphasis added.)

Notice that in 1935 the emphasis was on private planning under public supervision primarily aiming for economic efficiency. The Breyer and MacAvoy article summarizes the private planning experience (p. 662):

> "*Before 1960,* FPC regulation of the electric power industry had limited impact. The Commission issued licenses to build certain hydroelectric facilities, and it carried out orthodox "rate of return" reviews of "wholesale" prices in that small unintegrated portion of the industry where one company produces electricity and another distributes it. It collected information from companies within its jurisdiction, but it made no effort to plan for the industry as a whole. In fact, even these limited activities were difficult to perform, because the Commission followed a legal theory that made it virtually impossible to know, at any single point in time, the companies over which it had jurisdiction.
>
> "*In the early 1960's,* perhaps as a response to criticisms in the Landis Report, the Commission, under the direction of a new chairman and a rejuvenated staff, made a notable effort to plan a more efficient power industry. In 1964 it published an extensive study of the industry, the *National Power Survey (1964 Survey)*, which concluded that the nation's electric companies, by closer coordination of their plant construction and operations, could produce power far more *cheaply*. This survey was followed in 1967 by an extensive report suggesting ways to increase the *reliability* of the nation's transmission system. *More recently, (circa 1970)* the Commission has brought *environmental considerations* into the scope of its planning.
>
> The "coordination problem" thus early established the Commission's role as an "industrial planner". For one thing, the Commission recognized the problem in the early 1960's as an important one and undertook to resolve it. For another, this problem was virtually the only important planning activity on the Commission's agenda for several years.
>
> The problem initially did not seem intractable. In fact, it seemed a typical, though complicated, example of the sort of planning that commissions might be though capable of performing. Thus, the Commission's failure to solve the coordination problem should interest those who--like the early New Dealers--believe that regulatory agencies can be used to overcome the various planning problems created by technological advance, and it will help to evaluate the currently popular thesis that, given the poor results of price control, commissions should shift their emphasis from price control to planning. (Footnotes omitted and emphasis added.)

Notice here that coordination before 1960 had nothing to do with plant siting or construction and whatever coordination was accomplished was purely voluntary through pooling joint ventures and mergers. See Meeks, *Concentration in the Electric Power Industry: The Impact of Anti-Trust Policy, 72 Col. L. Rev. 64, 100-117* and especially note 192, p. 115, containing a statement of FPC policy as to merger.

History Of Private Planning--Specific To Siting Coordination

Journey, supra, at 274, gives us the background specific to siting coordination:

> "Chronologically, siting first appeared in the early 1960's as a transmission line construction, right-of-way, economic coordination matter. The nub of the question was how to facilitate economic coordination and power pooling of the Nation's 3,600 electric utility systems as contemplated in the Federal Power Commission's 1964 National Power Survey. At least three general factors were involved: (1) limitations of state eminent domain laws in respect to the construction of backbone transmission lines spanning several states and serving a general geographic region; (2) public policies affecting the use of Government lands for right-of-way purposes, . . . and (3) differing institutional policy views of the three ownership sectors of the utility industry (investor owned, publicly owned, and cooperatively owned), relative to tax status, capital cost relationships, and the matter of ownership autonomy." (Emphasis added.)

Journey goes on to state that the Report of the Legal Advisory Committee to the 1964 National Power Survey merely stated that better coordination could be achieved but made no specific suggestions for change because such suggestions would imply political controversial policies on which there was no consensus on the committee.

Journey goes on to summarize the emergence of public concern about reliability and adequacy of bulk power service following the 1965 Northeast power failure. Journey:

> "The matter of building and operating bulk power supply facilities--the larger electric generating stations and the interconnecting high-voltage transmission lines--became an adjunct of the public's principal concern, which, understandably, was continuity and reliability of electric power services. The Federal Power Commission's 46th Annual Report to Congress has summarized this metamorphosis:
>
> 'The Commission recommends examination of existing institutions for regional coordination . . . for interconnection of systems . . . for developing and applying reliability standards . . . for employing extra-high-voltage transmission . . . for securing needed rights-of-way . . . for assuring that small systems reasonably share in the economic and reliability benefits . . . and for maintaining continuity of bulk power supply.'
>
> * * *
>
> "Currently, [early 1970's] environmental or locational factors occupy a high degree of prominence in legislative considerations of power plant siting. This emphasis arose commencing in the mid and late 1960's. By that time, general public concern over environmental protection had found rather extensive legislative expression in each of the three basic environments--air, land,

> and water. Power plant construction and operation use each of these. Three Nationwide power plant siting studies added considerable impetus to the locational and environmental emphasis. One of those studies was conducted by the Working Committee on Utilities* while the other two were administered under the auspices of the Office of Science and Technology."** (Other footnotes omitted.)
>
> "The cumulative effect of delays in the construction and operation of electric generating stations and interconnecting backbone transmission facilities began to surface at approximately the same time as these developments. As this occurred, the adequacy aspect of electric reliability became all too apparent. *Power plant siting is both an environmental problem and a problem because of environmental concerns.* Summarizing these various interrelations and concepts, the 1970 *National Power Survey* tidies up the package rather neatly: 'Deterioration of the quality of electrical service would of itself and through its economic repercussions degrade our national life. That is the crux of the power issue facing the nation today . . . ." (Emphasis added.)

Present System Of Private Planning

Journey (at 282-83) describes the present system of private planning as follows:

> "Acting through its general rule-making authority, the [Federal Power] Commission has implemented . . . a procedure which provides for systematic public reporting of the utility operations and a mechanism for participation by the Federal Power Commission and state public service commission staff personnel in the activities of the utilities through an observer role status. In this manner, institutionalized public representation is projected into utility planning procedures at initiating levels. It is not an after-the-fact review of the type occurring in licensing cases which are subject to formal legal procedures of the Administrative Procedure Act.
>
> This program is carried on through nine regional electric reliability councils and a national organization (National Electric Reliability Council). Through these councils, the Nation's major electric utility systems coordinate the planning and operation of their respective major electric generating stations and inter-connecting transmission

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*Working Committee on Utilities, Report to the Vice President and to the President's Council on Recreation and National Beauty (1968).

**Office of Science and Technology, Consideration Affecting Steam Power Plant Site Selection (1968); Office of Science and Technology, Electric Power and the Environment (1970).

lines in the interests of adequacy and reliability of electric supply. This is accomplished on a regional basis and with due regard for operational and environmental considerations.

The public reporting system covering the utilities which participate in electric reliability council work covers such fundamental matters as load projections, generating resources, higher voltage interconnected-network facilities, electric stability analyses, communication and facility monitoring procedures, regional load shedding and maintenance programs, service restoration plans, pollution control and environmental information associated with proposed larger generating units, 300,000 kilowatts and higher, and transmission facilities, 230 kilovolts and higher. The work product, an organized body of information, is available to all governmental authorities and the general public.

Approximately 290 electric utility systems owning about 95 percent of the electric utility generating capacity within the United States participate in the Federal Power Commission's voluntary cooperative procedures program.* They serve in excess of 60 million ultimate electric consumers.

Legislation For Siting Control Introduced In The Early 1970s

Journey goes on to analyze some legislative proposals for controlling and coordinating the siting of new electrical generating facilities, specifically four bills introduced in the 92nd Congress 1st session (H.R. 605 (S. 294), H.R. 5277 (S. 1684), H.R. 6971, H.R. 11066) and one bill introduced in the 91st Congress, 2nd Session (S. 4421.). Of H.R. 605 Journey stated:

> "H.R. 605 is a federal facility certification bill, supplemented with legislative objectives aimed at securing, pursuant to Federal Power Commission review: (1) regional planning and operation of bulk power facilities according to Commission-prescribed criteria; (2) economic operational coordination of certified facilities, including all other bulk power facilities of the utility, whether investor-owned, publicly owned, or cooperatively owned; (3) and the protection and enhancement of environmental values. The facilities to be certified by the Federal Power Commission include transmission facilities of 200 kilovolts and higher which are constructed two years subsequent to the enactment of the bill and generating units

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*Statement of Policy, Reliability and Adequacy of Electric Service--Reporting Data--Participation of Regulatory Personnel in Regional Councils, 43 F.P.C. 515, Order No. 383-2 (Apr. 10, 1970). The respective federal-state staff work is coordinated through a series of staff level working groups established by the Federal Power Commission and the various state public service commissions under the cooperative procedures of the Federal Power Act, 16 U.S.C. § 824(h) (1970); see FPC News Release, No. 17, 198 (Dec. 18, 1970); Nat. Ass. of Regulatory Utility Commissioners Bulletin, No. 3 (Jan. 18, 1971). (Other footnotes omitted.)

> or plants constructed four years after enactment. Investor-owned, publicly owned, and cooperatively owned systems are subject to the certification requirement. Certification is compulsory in any of three circumstances: (1) in the event that the utility seeks to use eminent domain procedures; (2) if the Federal Power Commission deems certification proceedings necessary for regional coordination or other purposes; (3) or if a new governmental agency, the National Council on the Environment, deems such proceedings necessary for the preservation and enhancement of (a) environmental values, (b) conservation of natural resources, or (c) strengthening long-range land-use planning. Those elements, together with regional coordination, constitute the legislative standard for certification. Where ". . . some other technically and economically feasible and reliable kind of design of facilities, location therefore or manner of operation thereof is clearly preferable . . ." facilities cannot be certificated. The authority which the Commission or the Council would exercise is a negative form of action--a suspension order holding up the consummation of a planned utility proposal. Certification does not obviate the need for independent compliance with all laws affecting the environment.
>
> The Commission would be authorized to permit one utility, at that utility's expense, to enlarge and use the certificated facilities of another utility. The Commission, in directing the general coordination of physical facilities, operation, exchanges, and sales of power among utilities and in controlling the abandonment of bulk power operations, would be authorized to act to carry out regional coordination, subject to the prohibition that the Commission may not unduly burden a utility. The Commission would be authorized to ". . . secure the establishment of appropriate and effective regional organizations and procedures to carry out regional and inter-regional coordination . . ." and to compel utilities to participate in and support such regional organization. (Emphasis added.)

Two of the other four bills envisioned a prominent role for the reliability councils. Journey discussed the differences in the legislative proposals under nine headings which identify the major questions any proposal should address. The nine questions he identifies do not include one specifically related to interstate coordination or the avoidance of interstate disputes.

B. Antitrust Policy and Private Coordination:

The Meeks article cited above and Shenefield, Antitrust Policy Within the Electric Utility Industry, 16 Antitrust Bull. 681 (1971) are the most comprehensive recent surveys of this subject.

Meeks (presently the Dean of the College of Law at Ohio State), *supra*, at 65-66 states:

> "Congress has never exempted the electric power industry from the application of the antitrust laws. In fact, the major regulatory statutes require that the regulating agencies take account of antitrust considerations in any action

> they may take under these statutes. The Justice Department also has some responsibility in this area. Nevertheless, antitrust policy was, until recently, rarely viewed as important in this industry. Regulatory practices almost uniformly reflected the traditional view that the industry was a natural monopoly, ill-adapted to the application of antitrust principles. Recently, however, under pressures from several sources, both the Justice Department and the relevant regulatory agencies have begun to re-examine this assumption. The time seems ripe to implement a carefully conceived antitrust policy to aid regulatory control in promoting and protecting the public interest." (Footnotes omitted.)

Meeks proceeds with "Description of the Industry", concluding (at 69):

> "Thus, with some exceptions, the industry is composed of relatively large, vertically integrated, and geographically separated companies; the federal government, which generates a large block of power for its own use and for sale at wholesale but does not engage in retail operations; and a large number of relatively small municipals, cooperatives, and private companies, which are engaged primarily, and in many cases exclusively, in the distribution process." (Footnotes omitted.)

Then follows with a "Survey of the Technology of Power Generation and Delivery" (p. 69) and under "B. Generation", he concludes:

> "The choice of type and size of new generators will therefore depend upon the type of demand, the predicted demand curve, capital cost, fuel costs (including transportation), other operating costs, and availability of potential sites."*

Meeks then proposes "III. An Antitrust Policy": (at 76-77 and at 80-81). His conclusions are quoted:

> "It is the author's view that a careful application of antitrust concepts can supplement regulation without sacrificing available economies of scale. First, the industry is capable of sustaining some competition without sacrificing these economies. With the current potential for bulk generation and transmission, a moderate degree of competition is possible in the wholesale market. Second, the necessity of monopoly at one level of the industry does not

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*Siting is itself the result of several variables including distance from and transmission costs to load centers, maintaining reliability of the system as a whole, fuel transportation costs, aesthetic considerations including air and water pollution, and availability of sufficient water for cooling purposes. The supply of choice generating sites is declining rapidly, but economical, long distance transmission has eased the problem somewhat. See Power Survey, at 71-74, 93-95. See generally Hearings on Siting and Environmental Protection.

require the vertical extension of monopoly to other levels. Such vertical integration by ownership of generation, transmission, and distribution is neither technologically nor economically necessary. Third, the existence of a company with monopoly power in one geographic area does not in itself justify expansion by that company into another area. Fourth, some competition is possible on the margins of a company's territory if new growth of demand is occurring in an area not previously served with electricity. Fifth, very active competition exists between the electric power industry and other power sources. The extension of monopoly power beyond what is economically necessary may provide the electric company with artificial advantages in this competition. Sixth, there is active competition between firms to entice new customers to locate in their areas. Protection of each of these forms of competition seems well justified, at least by analogy, in currently prevailing antitrust theory. Each provides some justification for limited application of antitrust concepts to the electric power industry.

Thus far, competition has been discussed from the perspective of the company-consumer relationship. There are, however, two other interrelated competitive relationships in the industry that are of at least equal significance. These two species are competition between companies seeking to secure and retain a franchise to serve an area on a monopoly basis and what is known as yardstick competition. Yardstick competition exists by virtue of the comparison, as part of the regulatory process, of one utility's performance with that of another. This practice serves as a kind of check on the necessarily less-than-perfect regulatory control exercised by the responsible agencies."

* * *

at 80-81:

"Finally, the key question to be considered in formulating an antitrust policy for the industry is whether the benefits to be achieved by its application outweigh the costs, including foregone benefits. Although it is impossible to reach any firm conclusions in each situation to be discussed, some rather general hypotheses can be stated with fair assurance of their viability. First, the benefits of large-scale planning, construction, and operation of generation and transmission facilities are assumed to outweigh the benefits that might accrue from isolated, separate systems, each building only for its own generation needs. Second, it is assumed that a scheme that protects the structural and competitive interests outlined above without sacrificing the economies of scale in generation and transmission will produce the optimum benefits at the least cost. Third, the free play of market forces, when feasible, will probably achieve the goals of regulation to a greater degree and at a lesser cost than will direct government regulation.

> As noted earlier, the electric power industry is undergoing a continuing process of restructuring to take advantage of newly available economies of scale. This restructuring will occur in one or more of three ways: the development of a pervasive wholesale market for power from large generating plants; the creation of power pools, in which the participants combine their needs and construct large generating facilities on a joint basis; or massive mergers resulting in a few very large, integrated companies. The remainder of this article will be devoted to an analysis of the application of the suggested antitrust policy to these three developments. Certain antitrust problems common to all three will be treated separately."

Meeks in the next section "IV. Competition in the Market Place" finds a significant detriment to competition to be what he calls the "transmission bottleneck". He states: (at 86-88)

> "Refusal to wheel power over transmission lines forces wholesale customers within an integrated system's territory to look to that system for their power. The immediate result is to preclude any competition at the generation level, thus permitting the supplier to place the customer in a cost-price squeeze. By charging the wholesale customer a price equal to or just under the wholesaler's retail price, the supplier can force the buyer to charge a retail price higher than the wholesaler's retail price. Some price discrimination among wholesale customers is also prevalent.
>
> The Federal Power Act provides the FPC with the somewhat vague power to require interconnection of systems, but does not seem to empower it to exercise the kind of overall control suggested here. Several bills introduced in Congress over the past few years would have enhanced this power somewhat, but none would have required a company to construct additional transmission facilities if its existing lines were being used at capacity. Moreover, it is not clear to what extent the Commission might be willing to use the authority granted it under future legislation to promote competition at the generation level and, in fact, its record, in furthering such competition, has not been very impressive under the present statute. The Commission has not required wheeling--the transportation or exchange of electricity between two utilities over the lines of a third one--except occasionally under its powers to condition hydroelectric plant licenses and to authorize use of federal land for private transmission. It has also recently disclaimed power to require wheeling under section 824a(b). Nevertheless, the statute could be read to authorize the Commission to require establishment of adequate access to transmission facilities, a necessary condition for the development of competition at the generation level."

As stated in Section 2 of this report Congress has, as of 1978, given the Federal Energy Regulatory Commission power to require wheeling and even to compel the enlargement of transmission capacity (but not generating capacity). The new provision and the report of the conference committee indicate a Congressional intent to strengthen not inhibit the application of antitrust policy to the utility industry. (See Appendix B of Preliminary Report to this study on "Federal Law Aspects, etc.".) (See also discussion in Section 2 of Otter Tail Power Co. v. United States, 410 U.S. 380, a case decided after Meeks' article.)

Meeks goes on to discuss "V. Joint Ventures and Pooling Arrangements" and at 107 states:

> "In general, the larger the pool, the greater the savings possible from incremental loading because there are more generating units and, therefore, more cost variables to choose from. Pools employed for incremental loading must be of the most sophisticated variety since responsibility for operating the entire pooled facilities must be delegated to one operator or operating team. If systems are willing to do this, substantially more efficient operation can be achieved.
>
> To sum up, pooling results in significant economies and increased reliability. Moreover, usually, the larger the pool and the greater the cooperation and integration, the more substantial the gains will be. The result is better service and, assuming the economic benefits are passed on, lower prices for the consumer. For these two reasons, the FPC has very vigorously encouraged pooling."
>
> "D. Disincentives to Pooling":
>
> "Several disincentives to pooling have already been discussed. These include state regulatory policies relating to ownership, placement, and retirement of equipment for rate-making purposes, rate policies that provide little or no incentive to efficient operations, and reluctance of management to delegate or negotiate planning and operational decisions affecting their own system. In addition there are two very important and closely related disincentives that may govern the decision of a system to join a specific pool."

Then at 111 he summarizes what the antitrust attitude toward pooling ought to be:

> "In short, the sacrifice in actual or potential competition by pooling seems minimal and the benefits substantial. Finally, it is highly unlikely that the same degree of economy and reliability could be achieved independently, except as a result of much more drastic forms of consolidation, merger or acquisition of all systems in the area. Pooling should therefore meet a rule of reason test under the Sherman Act.

Congress in the 1978 National Energy Plan legislation added:

SEC. 205. Pooling

(a) STATE LAWS.--The Commission may, on its own motion, and shall, on application of any person or governmental entity, after public notice and notice to the Governor of the affected State and after affording an opportunity for public hearing, exempt electric utilities, in whole or in part, from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area. No such exemption may be granted if the Commission finds that such provision of State law, or rule or regulation--

(1) is required by any authority of Federal law, or

(2) is designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages.

(b) POOLING STUDY.--

(1) The Commission, in consultation with the reliability councils established under section 202(a) of the Federal Power Act, the Secretary, and the electric utility industry shall study the opportunities for--

(A) conservation of energy,

(B) optimization in the efficiency of use of facilities and resources, and

(C) increased reliability,

through pooling arrangements. Not later than 18 months after the date of the enactment of this Act, the Commission shall submit a report containing the results of such study to the President and the Congress.

(2) The Commission may recommend to electric utilities that such utilities should voluntarily enter into negotiations where the opportunities referred to in paragraph (1) exist. The Commission shall report annually to the President and the Congress regarding any such recommendations and subsequent actions taken by electric utilities, by the Commission, and by the Secretary under this Act, the Federal Power Act, and any other provision of law. Such annual reports shall be included in the Commission's annual report required under the Department of Energy Organization Act.

The conference committee explained:

> Section 205. Pooling
>
> This section authorizes the Commission on its own motion, and requires the Commission on application, to exempt electric utilities, where the circumstances specified in this section exist, from State laws, rules or regulations that prohibit or prevent voluntary pooling. No exemption is authorized where FERC finds that the law, regulation, or rule is required by Federal law or is designed to protect public health, safety or welfare or the environment or conserve energy or mitigate emergencies resulting from fuel shortages. This prohibition would include State siting laws, regulations under the Clean Air Act, and zoning laws, among others. Second, this section requires an 18-month Commission study on pooling. Third, it authorizes the Commission to recommend to electric utilities that they voluntarily negotiate to establish pooling arrangements where there is an opportunity through such an arrangement to conserve energy, to optimize the efficiency of use of facilities and resources, or to increase reliability.
>
> The conferees do not intend that the authority contained in subsection (a) of this section override any exclusive retail marketing area. It is directed at State laws and rules or regulations thereunder which prohibit or prevent voluntary coordination of electric utilities if the Commission determines, upon its own motion or upon complaint, that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area.

C. Legal Arrangements that Might Induce or Compel Greater Private Coordination of Power Plant Siting:

A short statement of the electric utility planning problem is necessary to an understanding of how the private sector might provide the planning and coordination of power plant siting necessary to future needs and consistent with public policy. Comprehensive electric utility planning calls for the accommodation of six separately identifiable but interrelated general considerations: efficiency, reliability, adequacy, environmental protection, energy resource utilization, and distributive equity. "Efficiency" means using the least amount of resources (capital and labor) per unit of production, i.e., getting the most bang for the buck. "Reliability involves the security of the interconnected transmission network and the avoidance of uncontrolled cascading tripouts which may result in widespread power outages",* i.e., getting the bang everytime. "Adequacy refers to having sufficient generating capacity to be able at all times to meet the aggregate electric peak loads"* of all users, i.e., getting enough bang. Environmental protection covers the short and long range impacts to the total environment—air, water, land and people—including the health, safety, aesthetic, social, and economic aspect of each, i.e., seeing that the bang causes the least damage practically obtainable. Energy resource utilization refers to the selection and conservation of non-renewable energy sources and their transportation. "Distributive equity" refers here to the territorial allocation of burdens and benefits of the location of sites so as not unduly to burden one area to benefit others even where consideration of the other five factors alone would make such allocation rational. It is this consideration that makes coordination among state and local representatives inevitable even if ultimate siting decision-making is entirely preempted by Congress. This territorial allocation is especially important with the Clean Air Act written as it is in terms of area ambient air quality rather than national stack emission limitations.

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*Eighth Annual Review, inside front. A Report by Interregional Review Subcommittee of the Technical Advisory Committee of the National Electric Reliability Council (1978).

None of these considerations can be viewed in isolation but it is extremely difficult to find an appropriate authority to combine them in a manner that is efficient and with results likely to be satisfactory to both the utility industry and the general public. Since the federal government presently relies on NERC and the regional councils for reliability and adequacy planning and coordination,** and since Congress has since 1935 mandated private coordination for efficiency, and since several of the bills for federal siting certification contemplated the extensive use of regional councils to create regional plans to (in the words of H. R. 11066, 92d Cong., 1st Sess. (1971) § 402(a)) "balance reasonable power needs and reasonable environmental factors",*** it seems appropriate to suggest ways that the utility industry might plan responsibly and confidently for future siting.

First, criteria for planning must be established either by the Department of Energy (under the existing Federal Power Act's mandate to FERC or, preferably, a new act) or by Congress, itself, setting forth with specificity what the regional plans must contain, including "need" standards. The criteria would probably specify that plans be on a contingency basis, i.e., contingent on various projections of future need. The nature and extent of alternatives analysis must be specified. Along with the criteria, various support systems could be authorized including the support of existing federal and state agencies. Public funding of all or part of the planning cost could be authorized. Time limits would be prescribed, both as to the time period planned for and the time period in which the planning must be completed.

Second, submission of the plan for public review and comment must be provided for. Specific notice to affected governmental entities and interested private groups would be required. A forum with federal agency representation and affected-state representation would be established and would hold hearings, either at one location central to the region or in every locale where a new generating facility of a certain size is planned. This forum would make recommendations for alterations in the plan which if accepted by the regional reliability council responsible for creating the plan, would make the plan with all its contingencies final. Appeal might be provided for on an expedited basis either to the United States Court of Appeals for the District of Columbia (because it is neutral) or to a special court. (See Section 7.) Review should be limited to whether or not the plan is reasonable in light of the mandating criteria.

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*Id.

**F.P.C. Order #383-2 found in 43 F.P.C. Rep. 515 (1970) or 35 Fed. Reg. 6121.

***HR6971, 92d Cong., 1st Sess. (1971) also provided for NERC and Regional Council planning.

Once the plan becomes final following whatever judicial review is provided, implementation of the plan could follow one of two courses. One course would be to require specific site approval under the plan either by FERC or by a specific state siting agency with the only issue being whether or not the specific generating facility and site proposed conforms to the approved plan. Public hearings could be held with standing defined so as to allow representation of various territorial and social interests. Although it might greatly complicate the decision, another issue might be whether circumstances have so changed as to make the planning choice no longer valid. A more likely issue (in fact an inevitable issue if the plan is a contingent plan providing for several alternative sites or no site depending on events future to the time of planning) is the question of what events have in fact transpired and therefore which of several alternative courses has the plan "chosen".

A second course of implementation would be (taking a lead from Maryland) for the federal government or the appropriate state government to buy the planned future sites and "bank" them. They could then lease or sell the site to the private utility when the time comes for actual building. In the meantime the government could use the site in a manner compatible with its future use as a generating site--for example using it as a temporary park or any other use including leasing it for agriculture use not requiring costly development. Site banking prevents the upsetting of well-laid plans for future sites which at the time of planning may be optimally suitable and compatible but which in the passage of the planned period (say 10 years) become incompatible or unsuitable. There are so many contingencies that can upset the best laid plans that removing one large contingency might prove a big help. Site banking could also be accomplished by authorizing the utilities, themselves, to acquire the future sites. In addition to the usual eminent domain grant, public monies or loan guarantees might be made available to underwrite the rather large outlay of capital this might entail--an outlay with no immediate generation of income.

The above arrangement for private planning under public supervision would utilize the technical know-how, organizing capacity, and profit motive to create the optimally efficient and reliable regional system adequate to various possible future needs as established by the public criteria makers, and at the same time because the private planner knows he must ultimately obtain public approval, he will provide for the publicly mandated environmental protection, energy resources utilization and the equitable distribution of burdens and benefits among the states of the region. Knowing the planning criteria and the public body whose approval must ultimately be sought should allow for efficient, responsible, and confident planning. In short, it should provide the opportunity for the utility industry to prove again that the genius of the American system is the ability of the private sector to plan for the public good.